

No. 7820

United States  
Circuit Court of Appeals  
for the Ninth Circuit.

NORTH RIVER INSURANCE COMPANY,  
a Corporation,

Appellant and Cross-Appellee,

GUY H. CLARK, as Receiver of the MONT-  
BORNE LUMBER COMPANY, a Corpora-  
tion,

Appellee and Cross-Appellant.

Transcript of Record

Upon Appeal and Cross-Appeal from the District Court of  
the United States for the Western District of  
Washington, Northern Division.

FILED

MAY 16 1935

PAUL P. O'BRIEN,



Digitized by the Internet Archive  
in 2011 with funding from  
Public.Resource.Org and Law.Gov

No. 7820

---

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

NORTH RIVER INSURANCE COMPANY,  
a Corporation,

Appellant and Cross-Appellee,  
vs.

GUY H. CLARK, as Receiver of the MONT-  
BORNE LUMBER COMPANY, a Corpora-  
tion,

Appellee and Cross-Appellant.

---

Transcript of Record

---

Upon Appeal and Cross-Appeal from the District Court of  
the United States for the Western District of  
Washington, Northern Division.



# INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Acceptance of Service.....	121
Answer .....	21
Appeal:	
Certificate of Clerk to Transcript.....	110
Citation on .....	111
Order Allowing.....	104
Petition for.....	101
Praecipe for Transcript of Record.....	108
Supersedeas and Cost Bond.....	104
Assignment of Errors.....	102
Assignment of Errors of Cross Appellant.....	114
Bill of Exceptions.....	32
Certificate of Judge to.....	99
Findings of Fact and Conclusions of Law as signed January 14, 1935.....	65
Memorandum Decision filed October 20, 1934, in District Court Action No. 20512 .....	58
Motion for entry of Conclusions of Law and Judgment:	
by Defendant.....	91
by Plaintiff .....	96
Order denying motions of Defendant and Plaintiff .....	94

## INDEX—(Continued)

	Page
<b>Bill of Exceptions—(Continued)</b>	
Order extending time ninety days.....	63
Stipulation, re certain facts, filed May 1, 1934 .....	33
<b>Exhibits attached to Stipulation:</b>	
1 Contract between Northern Pacific Railway Co. and Mont- borne Lumber Co., dated De- cember 19, 1927.....	39
2 Claim of Northern Pacific Railway Co., filed in Superior Court Action No. 13524.....	41
3 Amended Claim of Northern Pacific Railway Co., filed in Superior Court Action No. 13524 .....	45
Supplemental Stipulation, filed October 3, 1934 .....	48
Insurance Policy No. 11187 issued to Montborne Lumber Co. by North River Insurance Company (at- tached to Supplemental Stipula- tion) .....	49
Bond on Removal.....	19
Certificate of Clerk to Transcript on Appeal.....	110
Certificate of Clerk to Transcript on Cross Appeal .....	123

## INDEX—(Continued)

	Page
Citation on Appeal.....	111
Citation and Notice of Cross Appeal.....	125
Complaint .....	2
Cost Bond on Cross Appeal.....	117
Cross-Appeal:	
Acceptance of Service.....	121
Assignment of Errors.....	114
Citation and Notice of.....	125
Cost Bond.....	117
Order Allowing.....	116
Petition for .....	113
Stipulation, re printing.....	126
Judgment .....	31
Names and Addresses of Counsel.....	1
Notice of Intention to file Petition and Bond for Removal.....	18
Order:	
Allowing Appeal.....	104
Allowing Cross Appeal.....	116
of Removal.....	21
Petition for:	
Appeal .....	101
Cross Appeal.....	113
Removal .....	17
Praeclipe for Transcript of Record on:	
Appeal .....	108
Cross Appeal.....	122
Reply .....	28
Stipulation, re printing.....	126
Supersedeas and Cost Bond on Appeal.....	104



NAMES AND ADDRESSES OF COUNSEL.

Attorneys for Appellant,  
MESSRS. SAWYER & CLUFF,  
Balfour Building  
San Francisco, California

MESSRS. L. B. da PONTE and  
ROBERT S. MACFARLANE  
909 Smith Tower  
Seattle, Washington

Attorneys for Appellee,  
MESSRS. C. J. HENDERSON and  
ALFRED McBEE,  
Everett, Washington. [1]\*

---

\*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the Superior Court of the State of Washington  
in and For the County of Skagit.

No. 13756

20512

GUY H. CLARK, as Receiver of the MONT-  
BORNE LUMBER COMPANY, a corporation,  
Plaintiff,

vs.

NORTH RIVER INSURANCE COMPANY, a  
corporation,

Defendant.

### COMPLAINT

Comes now the plaintiff, as receiver of the Montborne Lumber Company, a corporation, and complains and alleges as follows:

#### I.

That the above named defendant is a corporation, and during all of the times herein mentioned, was and now is transacting business in Skagit County, State of Washington.

#### II.

That heretofore and upon the 11th day of August, 1930, the Montborne Lumber Company was a corporation, organized and existed under and by virtue of the laws of the State of Washington, and that thereafter and to-wit, upon the 20th day of April, 1931, this plaintiff, by order of the Superior Court of the State of Washington for Skagit County, in

a certain cause therein pending wherein Roy Van Maren was plaintiff, and Montborne Lumber Company, a corporation, defendant, was appointed receiver of said defendant corporation, and that ever since said time, this plaintiff has been and now is the duly appointed, qualified and acting receiver of said corporation.

### III.

That on said 11th day of August, 1930, the said defendant, in consideration of the sum of Six Hundred Thirty (\$630.00) Dollars premium, executed and delivered to these plaintiffs its certain policy of fire insurance, copy of which is hereto annexed, marked Exhibit "A" and made a part hereof. [2]

### IV.

That on or about the 4th day of September, 1930, the locomotive mentioned and described in said policy, and while located upon the railroad owned by the assured, was damaged by fire and by collapse of bridges forming a part of said railroad, and resulting from such fire, to the amount of Fifteen Thousand (\$15,000.00) Dollars.

### V.

That at said time and place, and while located upon the railroad of the assured and upon the branches and switches thereof, twelve (12) flat cars, covered by said policy, and owned by the Northern Pacific Railway Company, were by said fire and the collapse of bridges resulting therefrom,

as aforesaid, damaged to the amount of more than Eight Hundred Fifty (\$850.00) Dollars each, the amount of which damage is in excess of Ten Thousand Two Hundred (\$10,200.00) Dollars.

## VI.

That at the times hereinbefore set forth the said flat cars were in the possession of the assured under an agreement wherein and whereby the said Assured undertook and agreed to return and deliver them to the Northern Pacific Railway Company in as good condition as when delivered to the assured, and that as a result of said damage to said cars the said assured has been and is now unable to return the same to the Northern Pacific Railway Company in as good condition as they were at the time of *deliver* to assured, or at all, and that by reason of said facts, assured is legally liable to said Northern Pacific Railway Company in excess of the sum of Eight Hundred Fifty (\$850.00) Dollars on account of each of said cars damaged as aforesaid.

## VII.

That as soon as such loss was known to said assured, the same was reported to the defendant and that thereafter and on the 4th day of February, 1931, written proof of such loss was received by the said defendant by registered mail at its offices in San Francisco, California. [3]

## VIII.

That by reason of the facts hereinbefore set forth, defendant is liable to plaintiff in the sum of Twenty Five Thousand Two Hundred (\$25,200.00) Dollars, with interest from the 4th day of February, 1931.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of Twenty Five Thousand Two Hundred (\$25,200.00) Dollars, with interest as aforesaid, together with the costs and disbursements of this action.

AND FOR A FURTHER AND SECOND CAUSE OF ACTION. PLAINTIFFS ALLEGE the matters set forth in Paragraphs 1, *II and II* and further;

I.

That on or about the 30th day of August, 1930, the assured, Montborne Lumber Company, was in possession of five (5) certain freight cars belonging to the Northern Pacific Railway Company, which said freight cars assured *as* operating upon the line of its said logging railroad, and that under and by virtue of the terms of a contract between assured and said Northern Pacific Railway Company, assured was obligated to return the said cars to said railway company in as good condition as when the same were delivered to assured.

*ii.*

That on said 30th day of August, 1930, by reason of the derailment of the train in which said cars were being operated, the said cars were derailed, and were greatly damaged, and that by reason of such derailment, assured was compelled to spend the sum of Fourteen Hundred Seventy Six and 34/100 (\$1476.34) Dollars to repair said cars and

replace them upon said logging railroad, so that they might be returned to said Northern Pacific Railway Company.

### III.

That the damage to each of said cars on account of the derailment as aforesaid, was as follows: [4]

Car No. 120753	\$272.56
Car No. 121528	247.84
Car No. 121012	347.89
Car No. 121969	316.87
Car No. 120539	291.18

### IV.

That as soon as such loss was known to said assured, the same was reported to the defendant, and that thereafter and on the 4th day of February, 1931, written proof of such loss was received by the said defendant by registered mail at its offices in San Francisco, California.

WHEREFORE, plaintiffs demand judgment on their second cause of action in said sum of Fourteen Hundred Seventy Six and 34/100 (\$1476.34) Dollars, with interest from the 4th day of February, 1931, together with the costs and disbursements of this action.

For a further and third cause of action, plaintiff re-alleges paragraphs I, II and III of plaintiff's first cause of action, and further,

### I.

That on or about the 30th day of August, 1930,

the assured, Montborne Lumber Company, was in possession of five certain freight cars belonging to the Northern Pacific Railway Company, which, other than those mentioned heretofore in this complaint, belonged to the Northern Pacific Railway Company, and which said freight cars the assured was operating upon its logging railroad and that under and by virtue of the terms of the contract between the assured and the said Northern Pacific Railway Company, the assured was obligated to return the said cars to said railway company in as good condition as when the same were delivered to assured.

## II.

That on the 30th day of August, 1930, by reason of the derailment of the train in which the said cars were being operated, the said cars were derailed and were greatly damaged, and that thereafter, and to-wit, upon the 4th day of September, 1930, the said cars, while so derailed, were damaged and injured [5] by fire; that on account of the matters and things in this paragraph alleged, the said cars were damaged in the sum of \$850.00 each, or a total sum of \$4250.00.

## III.

That as soon as such loss was known to said assured, the same was reported to the defendant, and that thereafter and on the 4th day of February, 1931, written proof of such loss was received by the said defendant by registered mail at its offices in San Francisco, California.

WHEREFORE plaintiff prays judgment against the defendant on his third cause of action in the sum of \$4250.00 with interest thereon from the 4th day of February, 1931, until paid, together with his costs and disbursements herein.

C. J. HENDERSON

Attorney for Plaintiff. [6]

(“EXHIBIT A”)

THE NORTH RIVER INSURANCE COMPANY  
of THE CITY OF NEW YORK

## Marine Department

Appleton & Cox, Inc., Attorney

No. 1 South Williams St.

New York

Incorporated 1822 Capital \$2,000,000

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND of ..... SIX HUNDRED THIRTY ..... Dollars Premium DOES INSURE MONTBORNE LUMBER COMPANY

From the 8th day of August, 1930, at noon,  
To the 8th day of August, 1931, at noon,  
Standard Time at place of insurance against direct  
loss or damage as hereinafter provided to an amount  
not exceeding TWENTY FIVE THOUSAND  
TWO HUNDRED DOLLARS, to Rolling Stock, as  
per schedule, including all appliances, apparatus,

appurtenances, tools, spare and duplicate parts and equipment of every kind and description while on or attached to said Rolling Stock, while located as described herein, and not elsewhere.

## 1. Territorial Limits

This insurance covers only while the said Rolling Stock is in, on or about the Round House, Shops and Turntable of the assured or connecting lines and/or upon the line of any road owned or leased by the Assured, and its branches, spurs, side tracks and yards and upon such extensions or branches as may be constructed and/or leased by the Assured during the term of this policy and on the line of any connecting road or roads, all situated in the State of Washington, but it is warranted by the Assured to notify this Company, or the Agent who shall have issued the policy, in writing of their intention to use such extensions or branches as may be constructed and/or leased by the Assured prior to operation.

## 2. Perils Insured Against.

This policy Insures only:

Against loss or damage caused by fire, derailment or collision (coming together of cars and/or locomotives in shifting or coupling not to be considered a collision), collapse of bridges, lightning, cyclone, tornado and flood.

It is understood and agreed that in the event of loss or damage to any part or parts of the within insured property resulting from any one accident from perils insured against, this Company shall

only be liable for loss or damage in excess of Two Hundred Fifty Dollars (\$250.00)

3. Conditions.

(a) Notwithstanding anything in this policy to the contrary, it is warranted by the assured free from claim for loss or damage which may be attributed to, or *asire* from the act of any person acting or claiming to act under authority from any country or people, in a state of war (whether before or after declaration of war), revolution or internal commotion, and also from all consequences of hostilities, civil commotions, riots, and/or war-like operations, even if by lawless or unauthorized persons.

(b) It is expressly stipulated and made a condition of this contract that, in event of loss, this Company shall be liable [7] for no greater proportion thereof than the amount insured hereunder bears to NINETY per cent (90%) of the actual value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon.

(c) It is mutually understood and agreed that this Company shall not be liable beyond the actual cash value of the interest of the Assured in the property at the time of loss or damage not exceeding what it then cost the Assured to repair or replace the same with material of like kind and quality.

(d) In the event of any but a total loss under

this policy, the amount of said loss for which this policy is liable and shall be reinstated subject to all the conditions of the policy, the Assured warranting to pay pro rata premium upon the amount so reinstated from date of said loss.

(e) This entire policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance of the subject thereof; or in case of any fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

(f) It is warranted by the Assured that in case of loss or damage happening to the property insured hereunder, the same shall be reported as soon as the loss is known or expected to the Head Office of this Company at San Francisco, or to the Agent who shall have issued the policy. All adjusted claims shall be due and payable thirty days after presentation and acceptance of proofs of interest and loss at the office of this Company. No loss shall be paid hereunder if the Assured has collected the same from others.

(g) In the event of loss or damage caused by the risks and perils insured against, it shall be necessary for the Assured to use all lawful and proper efforts for the safeguard and recovery of the property or its value without prejudice to this insurance, and this Company will contribute to the just and reasonable charges thereof in such proportion as the sum named in this policy bears to the whole value at risk. And it is mutually agreed that

the acts of either party or their agents shall not be considered or held to be either a waiver or acceptance of an abandonment.

(h) No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of Law or Equity unless the Assured shall have fully complied with all the foregoing requirements, nor unless commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state.

(i) No person shall be deemed an Agent of this Company unless specifically authorized in writing by this Company.

(j) It is also agreed that no assignment or transfer hereof shall in any case relieve the assured of the property hereby insured from any or all of the conditions expressed in this policy, and that this policy shall be void in case of its being assigned or transferred without the written consent of this Company.

(k) This policy shall be cancelled at any time at the request of the Assured, or by this Company, by giving five (5) days written notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, the premiums having been actually paid, the unearned portion shall be returned on surrender of the policy, this Company retaining

the customary short rate, it being mutually understood and agreed however, that a minimum earned premium of \$472.50 is guaranteed this Company, except that when this policy is cancelled by the Company by giving notice, it shall retain only the pro rata premium. [8]

(l) This insurance to be null and void to the extend of any other insurance specific or otherwise on the within described property which would attach and cover were it not for the fact of this insurance.

Provisions required by law to be stated in this Policy:; This policy is in a stock corporation, and is issued under and in pursuance of Section 130, 131 and 132 of the Insurance Law of the State of New York.

IN WITNESS WHEREOF, the undersigned on behalf of the said Company, have subscribed their named, in the City of New York.

This Policy is void unless countersigned by the authorized agent of this Company at San Francisco, Calif.

APPLETON & COX, INC.

Attorney, Douglas F. Cox, President.

Countersigned,

PACIFIC MARINE INSURANCE  
AGENCY, INC.,

By S. S. HANSON, President

Date August 11, 1930

(Marine Dept.)

AMERICAN INSURANCE AGENCY  
By F. A. FREDERICK

## ENDORSEMENTS.

It is also understood and agreed that this policy covers the legal liability only of the assured on logging cars owned by others in the possession of the assured, but it is a warranty of this insurance that the insured shall not have at risk an average of more than twelve cars at a time.

It is further understood and agreed that loss, if any, on the first item (One Shay Locomotive #2703, 90 ton \$15,000.) is hereby made payable to the Pacific Equipment Company, Portland, Oregon, and the Montborne Lumber Company as their interests may appear.

All other terms and conditions remaining unchanged.

This slip is attached to and forms part of Policy No. 11187 of the North River Insurance Company issued to **MONTBORNE LUMBER COMPANY**.

Seattle, Wash., August 11, 1930.

(Marine Dept.)

AMERICAN INSURANCE AGENCY

By F. A. FREDERICK, Agent.

## ENDORSEMENT

It is hereby understood and agreed that clause No 2 of the Policy to which this endorsement is attached is corrected to read as follows:

This policy insures only against direct loss or damage by fire, derailment or collision, collapse of bridges, lightning, cyclone, tornado and flood.

It is hereby agreed that the term "collision" as

used herein, is defined as including only contact with objects, moving or stationary on rails, ties, or roadbed, coming together of car and/or locomotives in shifting or coupling being always excepted, and excluding contact with any falling objects or any objects off the rails, ties or roadbed.

It is understood and agreed that in the event of loss or damage to any part or parts of the within insured property resulting from any one accident from perils insured against, \$250.00 shall be [9] deducted from any claim on locomotives, \$250.00 from any other piece of equipment valued at \$7,500.00 or over, \$50.00 from any other pieces of equipment valued at less than \$7,500.00, but not more than \$250.00 in any one accident.

All other claims and conditions remaining unchanged.

This slip is attached to and made a part of Policy No. 11187 issued to Montborne Lumber Company by the North River Insurance Company.

Dated at Seattle, Wash., August 11th, 1930.

(Marine Dept.)

AMERICAN INSURANCE AGENCY  
By F. A. FREDERICK, Agent.

**ENDORSEMENT**

**MONTBORNE LUMBER COMPANY**

It is understood and agreed loss, if any hereunder, is payable to the Montborne Lumber Com-

pany and that the Pacific Equipment Company is no longer interested.

All other terms and conditions remaining unchanged.

This slip is attached to and forms part of Policy No. 11187 of the North River Insurance Company issued to Montborne Lumber Company, Seattle, Wash. August 14, 1930.

AMERICAN INSURANCE AGENCY  
By F. A. FREDERICK, Agent

(Written on reverse side of policy)

Trade Name	Year Built	Shop Number	Ton-	Insur- ance	Amount of Pre- mium
1 Shay loco- motive	#2703	90 Ton	\$15,000.00	2½%	\$375.00
12 CARS OWNED BY any others than the Assured, consisting principally of Northern Pacific flat cars, main line tanks, and coal gondolas, being an equal amount of cov- erage on each			\$10,200.00	2½%	\$255.00
Total			\$25,000.00		\$630.00

Filed May 28 1931, Will B. Ellis, County Clerk,  
By Arthur Eliason, Deputy.

[Endorsed]: Filed Jun 19 1931. [10]

[Title of Court and Cause.]

### PETITION.

COMES now the North River Insurance Company, defendant herein, and by this its petition respectfully shows to the court:—

That this is a civil action begun against your petitioner in this court and now pending therein, complaint and summons having been served on May 2, 1931.

The petitioner has not served or filed its answer or otherwise appeared in said cause, and the time for answering under the laws of the State of Washington will not expire until May 22, 1931.

When this action was commenced the plaintiff was and now is a citizen and resident of the State of Washington, and said Montborne Lumber Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and the defendant then was and now is a corporation organized and existing under and by virtue of the laws of the State of New York.

The matter in dispute exceeds the sum or value of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

The petitioner herewith submits to the court and files a bond as provided by the laws of the United States upon the removal of causes from a state court to the District Court of the United States, which bond is hereto attached.

WHEREFORE, your petitioner prays that this case be removed into the District Court of the United States for the Western District of Washington, Northern Division, and that this court accept this petition and said bond and proceed no further in the premises.

NORTH RIVER INSURANCE COMPANY  
By: SAWYER and CLUFF  
L. B. da PONTE and THOS H. MAGUIRE  
Its Attorneys.

Office and Post Office Address:

909 Smith Tower,  
Seattle, Wash.  
(Verification omitted)

Filed May 21, 1931. Will B. Ellis, County Clerk.  
[Endorsed]: Filed Jun 19, 1931. [11]

---

[Title of Court and Cause.]

NOTICE.

To GUY H. CLARK, as receiver of the Montborne Lumber Company, a corporation, plaintiff, and C. J. HENDERSON, his attorney;—

YOU ARE HEREBY NOTIFIED that on the 21st day of May, 1931, the defendant above named will file in the above entitled Court a petition and bond for removal of this cause to the District Court of the United States for the Western District of Washington, Northern Division, a copy of which

petition and bond are attached hereto and served herewith.

SAWYER AND CLUFF

L. B. da PONTE and THOS H. MAGUIRE

Attorneys for Defendant.

Received copy of the foregoing notice, also copies of petition and bond therein mentioned, this 19 day of May, 1931.

C. J. HENDERSON

Attorney for Plaintiff.

Filed May 21, 1931, Skagit County, Wash., Will B. Ellis, County Clerk, By Arthur Eliason, Deputy.

[Endorsed]: Filed Jun 19, 1931. [12]

---

[Title of Court and Cause.]

BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS:—

That we, North River Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, as principal, and NATIONAL SURETY COMPANY, a corporation organized and existing under the laws of the State of New York, as surety, are held and firmly bound unto Guy H. Clark, as receiver of the Montborne Lumber Company, a corporation, in the penal sum of Five Hundred Dollars (\$500.00), lawful money of the United States for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated the 16th day of May, 1931.

The condition of this obligation is such that the North River Insurance Company being about to file its petition to remove into the District Court of the United States a certain action brought by Guy H. Clark, as receiver of the Montborne Lumber Company, a corporation, plaintiff, against said North River Insurance Company, defendant, in the Superior Court of the state of Washington in and for the County of Skagit;

NOW, THEREFORE, if said defendant and petitioner shall enter in the District Court of the United States for the Western District of Washington, Northern Division, within thirty (30) days from the filing of said petition, a certified copy of the record in such action, and shall pay all costs that may be awarded by said District Court if said court shall hold that such action was wrongfully or improperly removed thereto, and shall there also appear and enter special bail in such action, if special bail was originally requisite therein, then this obligation to be void, otherwise to remain in full force and effect.

NORTH RIVER INSURANCE COMPANY  
By: THOS. H. MAGUIRE

Its Attorney.

[Seal] NATIONAL SURETY COMPANY  
By: R (illegible) WHYTE

Its Attorney-in-Fact.

Filed May 21, 1931, Skagit County, Wash., Will B. Ellis, County Clerk, By Arthur Eliason, Deputy.

[Endorsed]: Filed June 19, 1931. [13]

[Title of Court and Cause.]

ORDER

The above named defendant having filed its petition and bond for removal of this action to the District Court of the United States for the Western District of Washington, Northern Division and presented the same to this court, now on motion of the said defendant,

IT IS ORDERED that said petition and bond be accepted and that this court proceed no further in this cause.

DONE IN OPEN COURT this 21st day of May, 1931.

GEO. A. JOINER, Judge.

Filed May 21, 1931, Skagit County, Wash., Will B. Ellis, County Clerk, By Arthur Eliason, Deputy.

[Endorsed]: Filed Jun 19, 1931. [14]

---

[Title of Court and Cause.]

ANSWER.

COMES now the defendant, and answers plaintiff's complaint as follows:

I.

Admits Paragraph I.

II.

Admits Paragraph II.

## III.

Answering Paragraph III, admits that on August 11, 1930, the defendant, in consideration of the payment of Six Hundred Thirty Dollars (\$630.00) premium, executed and delivered to the Montborne Lumber Company a policy of insurance, and that Exhibit "A" attached to the complaint is a substantially correct copy of said policy, and except as herein expressly admitted, denies said Paragraph III and the whole thereof.

## IV.

Answering Paragraph IV, defendant denies that the locomotive mentioned and described in said policy was on September 4, 1930, or at any other time, damaged by fire or by collapse of bridges in the amount of Fifteen Thousand Dollars (\$15,000) or any sum whatsoever.

## V.

Answering Paragraph V, defendant admits that on or about September 4, 1930, there were in assured's possession twelve (12) flat cars owned by the Northern Pacific Railway Company, which cars were damaged by fire, but defendant denies knowledge or information as to the full extent of such damage sufficient to form a belief thereof, and therefore denies that said cars were damaged to the amount of Eight Hundred Fifty Dollars (\$850.00) each, or any part thereof, and otherwise, except as herein admitted, denies said Paragraph V and the whole thereof. [15]

## VI.

Answering Paragraph VI, defendant admits that following said fire the assured was unable to return said flat cars to the Northern Pacific Railway Company, but otherwise denies said Paragraph VI and the whole thereof, and particularly denies that assured is legally liable to said Northern Pacific Railway Company in the sum of Eight Hundred Fifty Dollars (\$850.00) or any sum whatsoever, on account of each of said cars or any of them.

## VII.

Answering Paragraph VII, defendant admits that defendant received on or about February 4, 1931, a writing designated by assured as "proof of loss", but except as herein expressly admitted, denies said Paragraph VII and the whole thereof.

## VIII.

Answering Paragraph VIII, defendant denies that it is liable to plaintiff or to any other person, firm or corporation under said policy, in the sum of Twenty-five Thousand Two Hundred Dollars (\$25,200), with interest, or in any sum whatsoever.

And defendant answers plaintiff's second cause of action as follows:—

## I.

Answering Paragraph I, defendant admits that on or about August 30, 1930, there were in assured's

possession five (5) flat cars owned by the Northern Pacific Railway Company, but otherwise denies said Paragraph I and the whole thereof.

## II.

Answering Paragraph II, defendant admits that on or about August 30, 1930, said five (5) cars were derailed, but denies that assured was compelled to spend or has spent One Thousand Four Hundred Seventy-six and 34/100 Dollars (\$1,476.34) or any sum whatsoever, to repair said cars or replace them on the track, and otherwise denies all of Paragraph II, except as herein admitted.

## III.

Answering Paragraph III, defendant denies that said cars or any of them were damaged in the sums therein set forth, ex- [16] cept that defendant admits that the Northern Pacific Railway Company expended the sum of Four Hundred Eighty-two and 13/100 Dollars (\$482.13) to repair said cars.

## IV.

Defendant denies each and every allegation set forth in Paragraph IV and the whole thereof.

And defendant answers plaintiff's third cause of action as follows:—

## I.

Answering Paragraph I, defendant admits that on or about August 30, 1930, the assured was in

possession of five (5) flat cars belonging to the Northern Pacific Railway Company, but otherwise denies said Paragraph I and the whole thereof.

## II.

Answering Paragraph II, admits that on September 4, 1930, said cars were damaged by fire, but denies knowledge or information of the full extent of such damage sufficient to form a belief thereof, and therefore denies that said cars were damaged in the sum of Eight Hundred Fifty Dollars (\$850) each or any part thereof, and otherwise, except as herein admitted, denies said Paragraph II and the whole thereof.

## III.

Denies Paragraph III and the whole thereof.

**AND FOR FURTHER ANSWER,** and by way of affirmative defense, defendant alleges as follows:

## I.

That on September 4, 1930, the Montborne Lumber Company had in its possession the twelve (12) flat cars described in plaintiff's first cause of action, and the five (5) cars mentioned in plaintiff's third cause of action, all of which said cars were the property of the Northern Pacific Railway Company. On said date said cars were all damaged by a forest fire in the vicinity of the Montborne Lumber Company's tracks.

That on August 30, 1930, said Montborne Lumber

Company had in its possession the five (5) cars mentioned in plaintiff's second cause of action, which cars were the property of [17] the Northern Pacific Railway Company and were derailed. Following the return of said cars to the Northern Pacific Railway Company, said Railway Company expended the sum of Four Hundred Eighty-two and 13/100 Dollars (\$482.13), in repairing same.

## II.

That the full damage to all of said cars did not exceed the sum of Eight Thousand Dollars (\$8,000), and on March 11, 1931, defendant paid to the Northern Pacific Railway Company the sum of Eight Thousand Dollars (\$8,000) in full settlement and satisfaction of any and all claims said Railway Company might have on account of the damage to or destruction or loss of any and all cars of said Railway Company covered by said policy of insurance.

## III.

That after the payment of said sum of Eight Thousand Dollars (\$8,000), and on or about the 7th day of December, 1931, said Northern Pacific Railway Company duly served upon plaintiff and filed with the Clerk of the Superior Court of the State of Washington in and for Skagit County, a claim in that cause entitled "Roy Van Maren, Plaintiff, v. Montborne Lumber Company, a corporation, De-

fendant, No. 13524", in which claim said Northern Pacific Railway Company stated that it neither had nor made any claim against said Montborne Lumber Company or its Receiver on account of damage to or failure to return the cars set forth in plaintiff's first, second and third causes of action, and released and discharged said Montborne Lumber Company and its Receiver from any and all liability for or on account of damage to said cars or failure to return the same, pursuant to the interchange contract in effect between said Railway Company and said Lumber Company, or otherwise.

#### IV.

That by reason of said payment of Eight Thousand Dollars (\$8,000.00) and the release of liability mentioned in Paragraph III hereof, the liability of the Montborne Lumber Company and its Receiver to said Northern Pacific Railway Company and the liability of defendant to said Montborne Lumber Company or its [18] Receiver, under the terms of said policy of insurance, were entirely extinguished.

#### V.

That said Montborne Lumber Company as a result of said fire and said derailment, suffered no damage or injury for which it was entitled to recover from this defendant under said policy of insurance.

WHEREFORE, defendant prays judgment that

plaintiff recover nothing herein, and for its costs and disbursements herein incurred.

SAWYER and CLUFF

L. B. da PONTE

THOS. H. MAGUIRE

Attorneys for Defendant.

(Verification omitted)

Received a copy of the foregoing Answer this 29 day of January, 1932.

C. J. HENDERSON

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 1, 1932. [19]

---

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff, and replying to the answer of the defendant, admits, denies and alleges as follows:

I.

Replying to the answer to plaintiff's first cause of action, the plaintiff herein denies each and every allegation therein contained except insofar as the same may be consistent with the matters and things alleged in plaintiff's first cause of action in the complaint herein.

Replying to the answer to plaintiff's second cause of action, the plaintiff herein denies each and every allegation therein contained except insofar as the

same may be consistent with the matters and things alleged in plaintiff's second cause of action in the complaint herein.

Replying to the answer to plaintiff's third cause of action, the plaintiff herein denies each and every allegation therein contained except insofar as the same may be consistent with the matters and things alleged in plaintiff's third cause of action in the complaint herein.

### I.

Relying to paragraph I of the affirmative defense in said answer contained, the plaintiff herein denies each and every allegation therein contained except insofar as the same may be consistent with the matters and things alleged in plaintiff's complaint.

### II.

Relying to paragraph II of said affirmative defense, the plaintiff denies each and every allegation therein contained, except insofar as the same may be consistent with the matters and things alleged in plaintiff's complaint. [20]

### III.

Relying to paragraph III of said affirmative defense, the plaintiff denies each and every allegation therein contained, except insofar as the same may be consistent with the matters and things alleged in plaintiff's complaint.

**IV.**

Replying to paragraph IV of said affirmative defense, the plaintiff denies each and every allegation therein contained, except insofar as the same may be consistent with the matters and things in plaintiff's complaint alleged.

**V.**

Relying to paragraph V of said affirmative defense, the plaintiff denies each and every allegation therein contained, except insofar as the same may be consistent with the matters and things alleged in plaintiff's complaint.

**C. J. HENDERSON**

Attorney for Plaintiff.

State of Washington

County of Skagit—ss.

Guy H. Clark, being first duly sworn, on oath deposes and says:

That he is the plaintiff named in the within and foregoing Reply, that he has read the same, knows the contents thereof and that the same is true as affiant verily believes.

**GUY H. CLARK**

Subscribed and sworn to before me this 29th day of August, 1932.

**ALFRED McBEE**

Notary Public in and for the State of Washington, residing at Mount Vernon.

[Endorsed]: Filed Feb. 8, 1933. [21]

In the District Court of the United States for the  
Western District of Washington,  
Northern Division.

No. 20512

**GUY H. CLARK**, as Receiver of the Montborne  
Lumber Company, a corporation,

Plaintiff,

vs.

**NORTH RIVER INSURANCE COMPANY**, a  
corporation,

Defendant.

**JUDGMENT.**

This matter regularly coming on to be heard upon application for entry of judgment herein, this cause having been tried to the court without a jury on October 3, 1934, upon stipulations of facts dated May 1, 1934, and October 3, 1934, and the court heretofore, to-wit, on October 20, 1934, entered and filed its memorandum decision herein, and the court having made and entered findings of fact and conclusions of law this 14 day of January, 1935, plaintiff appearing by his counsel, C. J. Henderson and Alfred McBee, and defendant appearing by its counsel, Sawyer & Cluff, L. B. DaPonte and Robert S. Macfarlane, and the court being fully advised in the premises;

**NOW, THEREFORE**, it is

**ORDERED, ADJUDGED and DECREED** that the plaintiff have and recover of and from the defendant Seven Thousand Dollars (\$7,000.00), to-

gether with interest at the rate of six per cent (6%) from date hereof, together with costs and disbursements as provided by law.

Exceptions allowed both plaintiff and defendant.

DONE IN OPEN COURT THIS 14 day of January, 1935.

JOHN C. BOWEN

District Judge.

Presented by:

ROBERT S. MACFARLANE

Notice of presentation waived.

C. J. HENDERSON

ALFRED McBEE

Attys for Pltf.

[Endorsed]: Filed Jan 14 1935. [22]

---

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That this cause came on for trial on the 3rd day of October, 1934, in the above-entitled Court before the Honorable John C. Bowen, Judge thereof, and that thereafter the following proceedings were had, that is to say:

Plaintiff appeared by Messrs. C. J. Henderson and Alfred McBee, his attorneys, and the defendant appeared by Messrs. Sawyer & Cluff, represented by Harold M. Sawyer, Esq. and L. B. da Ponte and Robert S. Macfarlane, its attorneys.

It further appeared that all of the facts were incorporated in written stipulations filed in the above-entitled cause on the 1st day of May, 1934, and the 3rd day of October, 1934. The written stipulation filed on the 1st day of May, 1934, was and is in words and figures as follows, that is to say: [23]

[Title of Court and Cause.]

### STIPULATION

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective counsel as follows:—

(1) That this stipulation shall constitute a stipulation as to the facts in the above entitled cause, and that the said cause shall be tried to the court without a jury.

(2) That on or about August 11, 1930, a policy of insurance was effected by the Montborne Lumber Company, (hereinafter called Lumber Company), with the defendant, the original of which policy of insurance is in the possession of plaintiff, and will be produced at the time of trial and admitted in evidence.

(3) That the lumber company at all times here in question was engaged in the business of logging near Montborne, Skagit County, Washington, and in connection with said operations said lumber company built a logging railroad back into the timber to the scene of its logging operations from the station of Montborne on the Seattle-Sumas main line of the Northern Pacific Railway Company.

(4) That on or about September 4, 1930, a forest fire broke out in the holdings of the Lumber Company and spread onto and over portions of the logging railroad owned and [24] operated by the Lumber Company, destroying certain bridges and trestles of said logging railroad.

(5) That the Lumber Company owned a certain 90-ton Shay locomotive, shop No. 2703, which locomotive at the time of the fire heretofore mentioned was situated on the logging railroad in the woods; and that by reason of the aforementioned destruction of certain bridges and trestles on the logging railroad between the locomotive and Montborne station, the said locomotive was marooned. The locomotive itself was never in contact with the fire and sustained no physical damage as a result of the fire. The cost of sufficiently repairing the said bridges and trestles in order to get the locomotive out of the woods and down to Montborne station would exceed the value of the locomotive. That at the time of the fire in question the reasonable market value of the said locomotive was \$7,000.00.

(6) That the Northern Pacific Railway Company (hereinafter called the Railway Company), is a corporation engaged in business as a common carrier railroad, and carries on its business in Skagit County and in the State of Washington and elsewhere. That the said Railway Company and the Lumber Company entered into a certain interchange agreement dated December 19, 1927, attached hereto and marked Exhibit 1 and made a part hereof as fully as if set forth herein in full, which said inter-

change agreement fully sets forth the rights and liabilities of the Lumber Company and the Railway Company with respect to cars and equipment belonging to the Railway Company used by the Lumber Company, which said agreement was in full force and effect at all times material to this litigation. [25]

(7) That on August 11, 1930, and for a long time prior thereto, and until the time of the fire before mentioned, the Railway Company furnished the Lumber Company its flat cars, main line tanks and coal gondolas for the purpose of loading and/or unloading freight under said interchange agreement; that the Lumber Company did not own any logging flat cars, main line tanks or coal gondolas, and that all rolling equipment of said character used or intended to be used at any time material to this litigation upon the logging railroad of the Lumber Company was rolling equipment owned by the Railway Company and furnished pursuant to the said interchange agreement.

(8) That it was the practice and procedure of both parties under the interchange agreement for the Railway Company to deliver empty logging flat cars to the Lumber Company upon the siding at Montborne station; that thereafter the Lumber Company, with its own locomotive, took said logging flat cars from said siding over its logging railroad into the timber to the scene of its operations for the purpose of loading; that after loading, the logging flat cars were thereupon taken by the

locomotive of the Lumber Company back to the siding at Montborne station, from which siding said cars were picked up by the Railway Company for further transportation over its railroad to destination.

(9) That this practice and procedure and this form of interchange agreement, with substantially identical provisions, was usual and customary between logging railroads and common carrier railroads in Western Washington at all times material to this litigation.

(10) That on or about August 30, 1930, five certain logging flat cars, (N.P. 120753, N. P. 121-526, N. P. 121012, [26] N. P. 121969, N. P. 120-539), belonging to the Railway Company and in the possession of the Lumber Company pursuant to the terms of the interchange agreement, were derailed, and that by reason of said derailment were damaged in the amount of \$482.13, which damage was fully repaired by the Railway Company at its expense.

(11) That on or about September 4, 1930, said cars which had been derailed and repaired, together with other logging flat cars, (N. P. 120107, N. P. 121134, N. P. 122087, N. P. 121041, N. P. 121683, N. P. 120411, N. P. 121116, N. P. 120880, N. P. 121447, N. P. 121818, N. P. 120565, N. P. 121275, N. P. 121379, N. P. 121385, N. P. 122011, N. P. 121742 and N. P. 119222), totalling 22 logging flat cars, were destroyed by the forest fire heretofore mentioned, which said logging flat cars were the

property of the Railway Company, and were in the possession of the Lumber Company pursuant to the terms of the interchange agreement heretofore mentioned.

(12) That no flat cars, main line tanks or coal gondolas other than those herein described belonging to others than the Lumber Company were upon the logging railroad or in the possession of the Lumber Company at the time of the fire.

(13) That the loss and damage caused by derailment and/or fire to all of said cars was in the total sum of \$8,000.00.

(14) That shortly after the said fire said Lumber Company became hopelessly insolvent and went into receivership and plaintiff is now the receiver of said Lumber Company, liquidating the same.

(15) That on or about January 20, 1931, there was filed in the proper proceeding involving the insolvency [27] and receivership of the Lumber Company, a claim by the Northern Pacific Railway Company against the Lumber Company, which said claim is attached hereto marked **Exhibit 2**, and made a part hereof the same as if herein fully set out; that the detailed statement and vouchers referred to in Paragraph 2 of said claim, refer to demurrage and other items not material to the present litigation, and are therefore, by agreement, eliminated from the said exhibit.

(16) That on or about November 28, 1931, there was properly and timely filed in the proper proceed-

ing involving the insolvency and receivership of the Lumber Company, a waiver and release of the claims of the Railway Company against the Lumber Company on account of any legal liability or otherwise for damage to any of said logging flat cars for any cause whatsoever, all as appears in the so-called "amended claim of the Northern Pacific Railway Company" attached hereto and marked Exhibit 3, and made a part hereof the same as if herein fully set out; that the cars itemized and listed in said amended claim are the cars damaged by derailment and fire as heretofore described herein; that the amounts claimed as shown in the last two paragraphs of said amended claim are in addition to all loss or damage on account of the said logging flat cars; that said items are immaterial to this litigation and refer to demurrage and other like charges.

(17) That the defendant Insurance Company paid to the Railway Company on February 26, 1931, the sum of \$8,000.00 in full settlement and satisfaction of any and all claims said Railway Company might have against it or the Lumber Company or on account of the damage to or destruction or loss of any and all cars of said Railway Company covered by the said policy of insurance; that [28] said settlement and satisfaction made by the defendant Insurance Company was without the consent of the receiver.

(18) By reason of all of the foregoing, the defendant Insurance Company has refused to pay or

recognize the claim of the Lumber Company now being prosecuted seeking \$7,000.00, because of the aforesaid Shay locomotive and \$8,000.00 because of the derailment and burning of the aforesaid logging flat cars.

(19) In the event this court should decide either or both phases of this case in favor of the plaintiff, it is agreed that judgment is to be entered in the applicable amount or amounts herein set forth as the loss or damage, said judgment to carry interest from its date.

(20) That this stipulation is to be read in connection with the pleadings herein.

Dated this 1st day of May, 1934.

C. J. HENDERSON

and ALFRED McBEE

Attorneys for Plaintiff.

SAWYER & CLUFF

L. B. da PONTE and

ROBERT S. MACFARLANE

Attorneys for Defendant.

#### EXHIBIT 1.

CONTRACT made this 19th day of December, A.D. 1927, between the NORTHERN PACIFIC RAILWAY COMPANY, a Wisconsin corporation, hereinafter called "Railroad" and the Montborne Lumber Company, a Washington corporation, hereinafter called "Lumber Company."

In consideration of the mutual dependent promises stated in this contract the parties agree:—

**I.**

Connections between the tracks of the parties hereto [29] have been installed at Montborne, Washington, under the provisions of a contract between them dated November 22, 1926, and the parties agree to interchange carload business at such point through such connections.

**II.**

The Lumber Company agrees to pay the Railroad for all damage which cars delivered to it by the Railroad through such connections may sustain from any cause whatever while in its possession and to indemnify and protect the Railroad against any claim for personal injury or death on account of alleged defects in such equipment and to return promptly all cars received from the Railroad and be governed by tariff provisions relating to demurrage.

GTR FRB WEC JEC AVB FEW

**III.**

For the purpose of fixing liability for loss and damage to cars and their loads, cars and loads placed by the Railroad at the point of interchange for movement over the logging railroad of the Lumber Company or for the use of the Lumber Company shall be deemed to be in the Lumber Company's possession and to continue in its possession until the Railroad shall move said cars from said point of interchange on to its own main track.

IN WITNESS WHEREOF the parties hereto have caused this contract to be executed by officers

thereunto duly authorized on the day and year first above written.

NORTHERN PACIFIC RAILWAY  
COMPANY

By F. F. WILLIAMSON

Its Vice President

WITNESSES:

T. K. YOUNG

R. D. VANVOORHIS

MONTBORNE LUMBER COMPANY

By THOMAS SMITH

Its President.

WITNESSES:

FRANK F. DAY

L. G. HARVEY

---

EXHIBIT 2.

In the Superior Court of the State of Washington  
in and for Skagit County.

No. 13524

ROY VAN MAREN,

Plaintiff,

vs.

MONTBORNE LUMBER COMPANY, a corpora-  
tion,

Defendant.

CLAIM OF NORTHERN PACIFIC RAILWAY  
COMPANY. [30]

Pursuant to the court's order and the notice of

receivers dated the 21st day of October, 1930, that claims duly verified with proper vouchers attached be presented on or before January 24, 1931, the Northern Pacific Railway Company states the following:—

There is attached hereto a statement in detail with vouchers attached showing an amount of \$6,177.40 due from the Montborne Lumber Company to Northern Pacific Railway Company on account of the items shown in the detailed statement and vouchers attached hereto, and said details and vouchers are self-explanatory.

In addition to said amount, the Montborne Lumber Company has in its possession 20 cars belonging to the Northern Pacific Railway Company delivered by claimant to said Montborne Lumber Company under the interchange contract dated the 19th day of December, 1927, copy of which is in the possession of the Montborne Lumber Company. Said cars have been more or less damaged, as shown by the statement hereto attached. Claimant states that there is a policy of insurance on said cars, or some of them, issued to Montborne Lumber Company by the North River Insurance Company, and this company claims that said policy inures to its benefit and that it is entitled to the protection of said policy on said cars and to the money due thereon. Claimant has not received any sum on account of said insurance and cannot state when it will receive anything thereon, nor the amount thereof, and therefore cannot at this time state

what balance will be due from the Montborne Lumber Company and its receivers on account of the damage or destruction of said cars. Claimant further shows that there will be salvage from said cars, which should be deducted from said account, but cannot state [31] at this time what the amount of said salvage will be, nor the cost of recovering said cars. Claimant will file an amended claim at a later date showing the balance due from the Montborne Lumber Company on account of said cars after deducting the amount claimant receives from the said Insurance Company and the salvage therefrom, if any.

Dated at Seattle, Washington, this 19th day of January, 1931.

NORTHERN PACIFIC RAILWAY  
COMPANY

By L. B. da PONTE  
THOS. H. MAGUIRE

Its Attorneys.

State of Washington  
County of King—ss.

L. B. da PONTE, being first duly sworn, on oath deposes and says:— That he is one of the attorneys for the claimant in the above entitled action; that the same is a foreign corporation, and he makes this verification for and in its behalf, being authorized so to do; that he has read the above and foregoing claim of the Northern Pacific Railway Com-

pany, knows the contents thereof, and believes the same to be true.

L. B. da PONTE

Subscribed and sworn to before me this 19th day of January, 1931.

BRUCE JENNINGS

Notary Public in and for the State of Washington, residing at Seattle, Wash. [32]

**LIST OF 20 FLAT CARS DESTROYED OR  
DAMAGED BY FIRE, WHILE ON THE  
MONTBORNE LUMBER COMPANY'S  
TRACKS OR POSSESSION, SEPTEMBER  
5, 1930.**

Car No	Date Built	Original Cost	Depreciated Value	Estimated sale value before damage	Extent damaged	
120411	1906	589.36	225.73	500.00	Sills burned, cannot move.	
121447	1927	1220.99	1035.17	1100.00	" " " "	" "
121818	1927	1207.15	1069.90	1100.00	" " " "	" "
119222	1906	603.61	237.79	500.00	" " " "	" "
120880	1902	572.77	225.73	500.00	" " " "	" "
121116	1926	1249.16	1023.61	1100.00	" " " "	" "
120771	1901	549.11	225.64	500.00	" " " "	" "
120187	1906	596.27	231.85	500.00	" " " "	" "
122011	1927	1207.15	1068.90	1100.00	" " " "	" "
121385	1926	1241.17	1021.85	1100.00	" " " "	" "
121379	1926	1241.17	1021.85	1100.00	" " " "	" "
120565	1900	807.15	405.19	500.00	" " " "	" "
121683	1927	1220.99	1035.16	1100.00	Sills damaged, can be moved.	
121041	1926	1241.15	1015.60	1100.00	" " " "	" "
122087	1927	1207.15	1068.89	1100.00	" " " "	" "
121731	1927	1207.15	1068.90	1100.00	" " " "	" "
121134	1926	1249.16	1023.60	1100.00	" " " "	" "
121275	1927	1241.17	1021.86	1100.00	Broken brk cyl.	" "
121475	1927	1220.99	1035.17	1100.00	O. K.	
121742	1927	1207.15	1068.90	1100.00	Totally destroyed	
		20879.97	16131.29	18400.00		

St. Paul, Minn.

Sept. 30, 1930 [33]

## EXHIBIT 3.

In the Superior Court of the State of Washington,  
in and for Skagit County

No. 13524

ROY VAN MAREN,

Plaintiff,

vs.

MONTBORNE LUMBER COMPANY, a corpora-  
tion,

Defendant.

AMENDED CLAIM OF NORTHERN PACIFIC  
RAILWAY COMPANY.

The Northern Pacific Railway Company states that it has received payment of the sum of \$8,000.00 from North River Insurance Company on account of the twenty cars belonging to said railway company delivered by it to the Montborne Lumber Company under the interchange contract dated the 19th day of December, 1927, referred to in its original claim. It states that it has no claim and makes no claim against the Montborne Lumber Company, or the Receiver of said company, for and on account of said twenty cars, or any of them.

The Northern Pacific Railway Company further states that it neither has nor makes any claim against said Montborne Lumber Company or said receiver for or on account of any legal liability, or otherwise, for damage to or failure to return cars 120107, 121134, 122087, 121041, 121683, 120411,

121116, 120880, 121447, 121818, 120565 and 121275, and releases and discharges said Montborne Lumber Company and its receiver from any and all legal liability for or on account of damage to said cars or failure to return the same pursuant to the interchange contract above referred to or otherwise.

The Northern Pacific Railway Company further states that it has no claim and makes no claim against said Mont- [34] borne Lumber Company for and on account of any damage to or failure to return cars 120753, 121526, 121012, 121969 and 120539, and releases and discharges said Montborne Lumber Company and its receiver from any and all liability for and on account of damage to said cars or any of them, or failure to return the same, or any of them, as provided by said interchange contract, or otherwise.

The Northern Pacific Railway Company further states that it has no claim and makes no claim against said Montborne Lumber Company for and on account of any damage to or failure to return cars 121379, 121385, 122011, 121742 and 119222, and releases and discharges said Montborne Lumber Company and its receiver from any and all liability for and on account of damage to said cars or any of them, or failure to return the same, or any of them, as provided by said interchange contract, or otherwise.

The claim of the Northern Pacific Railway Company is hereby limited to the items shown in its original claim, to-wit:—for freight and demurrage \$1935.26; for bills rendered as per statement in the

sum of \$4072.70 less bill No. 89754 in the sum of \$482.13, which item is excluded from the above, and the item of indebtedness incurred subsequent to appointment of the receiver in the sum of \$169.44.

The total claim of the Northern Pacific Railway Company, which is justly due and unpaid, is the sum of \$5695.27, to which sum its said original claim is hereby amended.

Dated at Seattle, Washington, this 17th day of November, 1931.

NORTHERN PACIFIC  
RAILWAY COMPANY  
By L. B. DaPONTE and  
THOS. H. MAGUIRE  
Its Attorneys [35]

State of Washington  
County of King—ss.

L. B. daPonte, being first duly sworn, on oath deposes and says:—That he is one of the attorneys for claimant in the above entitled action; that the same is a foreign corporation, and he makes this verification for and in its behalf, being authorized so to do; that he has read the above and foregoing amended claim of Northern Pacific Railway Company, knows the contents thereof, and believes the same to be true.

L. B. daPONTE

Subscribed and sworn to before me this 17th day of November, 1931.

BRUCE JENNINGS

Notary Public in and for the State of Washington, residing at Seattle.

Received a copy of the foregoing amended claim this 28th day of November, 1931.

(Sgd.) C. J. HENDERSON,

By A. McBEE

Attorneys for

The written stipulation filed on the 3rd day of October, 1934, was and is in words and figures as follows:

“In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20512

GUY H. CLARK, as Receiver of the Montborne Lumber Company, a corporation,

Plaintiff,

vs.

NORTH RIVER INSURANCE COMPANY, a corporation,

Defendant.

#### SUPPLEMENTAL STIPULATION.

IT IS HEREBY STIPULATED by and between the parties [36] hereto by their respective counsel as follows:—

- (1) That attached hereto is a copy of the policy of insurance mentioned in Paragraph (2) of the original stipulation of facts herein, and this said copy of said policy of insurance may be used on the trial of this cause for all intents and purposes the same as if the original were produced and admitted in evidence.

(2) The original stipulation of facts herein dated May 1, 1934, together with this supplemental stipulation, shall constitute the entire stipulation of facts to be submitted to the above entitled court for determination of the above entitled cause.

Dated this 3d day of October, 1934.

C. J. HENDERSON

and ALFRED McBEE

Attorneys for Plaintiff

SAWYER & CLUFF,

L. B. DaPONTE and

ROBERT S. MACFARLANE

Attorneys for Defendant [37]

No. 11187

THE NORTH RIVER INSURANCE COMPANY

Of the City of New York.

---

Marine Department

Appleton & Cox, Inc. Attorney

No. 1 South William Street

New York.

Incorporated 1822

Capital \$2,000,000

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND OF SIX HUNDRED THIRTY Dollars Premium

DOES INSURE MONTBORNE LUMBER COMPANY

From the 8th day of August, 1930, at noon,

To the 8th day of August, 1931, at noon,

Standard Time at place of insurance against direct loss or damage as hereinafter provided, to an amount not exceeding TWENTY FIVE THOU-

SAND TWO HUNDRED Dollars, to Rolling Stock, as per schedule, including all appliances; apparatus, appurtenances, tools, spare and duplicate parts and equipment of every kind and description while on or attached to said Rolling Stock, while located as described herein, and not elsewhere.

### 1. Territorial Limits.

This insurance covers only while the said Rolling Stock is in, or *or* about the Round House, Shops and Turntable of the Assured or connecting lines and/or upon the line of any road owned or leased by the Assured, and its branches, spurs, side tracks and yards and upon such extensions or branches as may be constructed and/or leased by the Assured during the term of this policy and on the line of any connecting road or roads, all situated in the State of WASHINGTON but it is warranted by the Assured to notify this Company, or the agent who shall have issued the policy, in writing of their intention to use such extensions or branches as may be constructed and/or leased by the Assured prior to operation.

### 2. Perils Insured Against

This Policy insures only:—

Against loss or damage caused by fire, derailment or collision (coming together of cars and/or locomotives in shifting or coupling, not to be considered a collision), collapse of bridges, lightning, cyclone, tornado and flood.

It is understood and agreed that in the event of loss or damage to any part or parts of the within insured property resulting from any one accident from perils insured against, this Company shall only be liable for loss or damage in excess of Two Hundred Fifty Dollars (\$250.00). [38]

### 3. Conditions

(a) Notwithstanding anything in this policy to the contrary, it is warranted by the assured free from claim for loss or damage, which may be attributed to, or arise from, the act of any person acting or claiming to act, under authority from any country or people, in a state of war (whether before or after declaration of war), revolution, or internal commotion, and also from all consequences of hostilities, civil commotions, riots, and/or war-like operations, even if by lawless or unauthorized persons.

(b) It is expressly stipulated and made a condition of this contract that, in event of loss, this Company shall be liable for no greater proportion thereof than the amount insured hereunder bears to NINETY per cent (90%) of the actual value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon.

(c) It is mutually understood and agreed that this Company shall not be liable beyond the actual case value of the interest of the Assured in the property at the time of loss or damage nor exceeding what it then cost the Assured to repair or replace the same with material of like kind and quality.

(d) In the event of any but a total loss under

this policy, the amount of said loss for which this policy is liable shall be reinstated subject to all the conditions of the policy, the Assured warranting to pay pro rata premium upon the amount so reinstated from date of said loss.

(e) This entire policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

(f) It is warranted by the Assured that in case of loss or damage happening to the property insured hereunder, the same shall be reported as soon as the loss is known or expected to the Head Office of this Company at San Francisco, or to the Agent who shall have issued this policy. All adjusted claims shall be due and payable thirty days after presentation and acceptance of proofs of interest and loss at the office of this Company. No loss shall be paid hereunder if the Assured has collected the same from others.

(g) In the event of loss or damage caused by the risks and perils insured against, it shall be necessary for the Assured to use all lawful and proper efforts for the safeguard and recovery of the property or its value without prejudice to this insurance, and this Company will contribute to the just and reasonable charges thereof in such proportion as the sum named in this policy bears to the whole value at risk. And it is mutually agreed that the

acts of either party or their agents in securing, preserving or recovering the property insured shall not be considered or held to be either a waiver or acceptance of an abandonment. [39]

(h) No suit or action on this policy for the recovering of any claim shall be sustainable in any Court of Law or Equity unless the Assured shall have fully complied with all the foregoing requirements, nor unless commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

(i) No person shall be deemed an Agent of this Company unless specifically authorized in writing by this Company.

(j) It is also agreed that no assignment or transfer hereof shall in any case relieve the Assured of the property hereby insured from any or all the conditions expressed in this policy, and that this policy shall be void in case of its being assigned or transferred without the written consent of this Company.

(k) This policy shall be cancelled at any time at the request of the Assured, or by this Company, by giving five (5) days' written notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, the premiums having been actually paid, the unearned portion shall be returned on sur-

render of the policy, this Company retaining the customary short rate, it being mutually understood and agreed however, that a minimum earned premium of \$472.50 dollars, is guaranteed this Company, except that when this policy is cancelled by the Company by giving notice, it shall retain only the pro rata premium.

(l) This insurance to be null and void to the extent of any other insurance specific or otherwise on the within described property which would attach and cover were it not for the fact of this insurance.

Provisions Required by Law To Be Stated in This Policy:—This policy is in a stock corporation, and is issued under and in pursuance of Section 130, 131 and 132 of the Insurance Law of the State of New York.

IN WITNESS WHEREOF, the undersigned, on behalf of the said Company, have subscribed their names, in the City of NEW YORK.

This policy is void unless countersigned by the authorized agent of this company at San Francisco, California.

APPLETON & COX, INC.

Attorney

DOUGLAS F. COX

President

(Marine Dept.)

AMERICAN INSURANCE

AGENCY

By F. A. FREDERICK

Agents.

Countersigned,

PACIFIC MARINE INSURANCE

AGENCY, INC.

By S. S. HANSON

President

Date August 11th, 1930. [40]

### ENDORSEMENT

It is hereby understood and agreed that clause No. 2 of the policy to which this endorsement is attached is corrected to read as follows:—

This Policy insures only against direct loss or damage by fire, derailment or collision, collapse of bridges, lightning, cyclone, tornado and flood.

It is hereby agreed that the term "Collision" as used herein, is defined as including only contact with objects, moving or stationary on rails, ties or roadbed, coming together of cars and/or locomotives in shifting or coupling being always excepted, and excluding contact with any falling objects or any objects off the rails, ties or roadbed.

It is understood and agreed that in the event of loss or damage to any part or parts of the within insured property resulting from any one accident from perils insured against, \$250.00 shall be deducted from any claim on locomotives, \$250.00 from any other piece of equipment valued at \$7,500.00 or over, \$50.00 from any other piece of equipment valued at less than \$7,500.00, but not more than \$250.00 in any one accident.

All other terms and conditions remaining unchanged.

This slip is attached to and made a part of Policy No. 11187, issued to MONTBORNE LUMBER COMPANY by the NORTH RIVER INSURANCE COMPANY.

Dated at SEATTLE, WASH, AUGUST 11th, 1930.

(Marine Dept.)  
AMERICAN INSURANCE  
AGENCY  
By F. A. FREDERICK

Agents

#### ENDORSEMENT

It is also understood and agreed that this policy covers the legal liability only of the assured on logging cars owned by others in the possession of the assured, but it is a warranty of this insurance that the insured shall not have at risk an average of more than twelve (12) cars at any one time.

All others terms and conditions remaining unchanged.

This slip is attached to and forms part of Policy No. 11187 of the NORTH RIVER INSURANCE COMPANY issued to MONTBORNE LUMBER COMPANY.

Seattle, Wash. AUGUST 11th, 1930.

(Marine Dept.)  
AMERICAN INSURANCE  
AGENCY  
By F. A. FREDERICK

Agent [41]

(Written on reverse side of policy)

## Each Unit Separately Insured

## Amount

## of

Trade Name	Year Built	Shop Number	Ton- nage	Insur- ance	Pre- mium
1 Shay loco- motive		#2703	90 Ton	\$15,000	2½% \$375.00
12 CARS OWNED by any others than the Assured, consisting principally of Northern Pacific flat cars, main line tanks, and coal gondolas, being an equal amount of coverage on each				\$10,200	2½% \$255.00
Total				\$25,200.	\$630.00

[42]

No other evidence was offered by either party and thereupon both plaintiff and defendant, through their respective attorneys, made motions for a declaration of law and for special findings in accordance with said stipulations, and each of them, and for judgment in favor of their respective clients, and said motions were argued orally to the Court.

That thereupon, pursuant to motions made by the respective parties through their respective attorneys, the Court ordered that the cause be submitted upon briefs with periods then and there fixed by the Court, and that pursuant to such order briefs on behalf of the respective parties were filed within the time limited by said order, in which briefs motions

for judgment in favor of the respective parties were incorporated by their respective attorneys, and upon the filing of the last brief the cause was submitted.

Thereafter, and on the 20th day of October, 1934, the said Honorable John C. Bowen made and filed his Memorandum Decision of the above-entitled cause, in words and figures as follows:

"In the District Court of the United States, for the Northern District of Washington, Northern Division.

No. 20512

GUY H. CLARK, as Receiver of the Montborne Lumber Company, a corporation,

Plaintiff,

vs.

NORTH RIVER INSURANCE COMPANY, a corporation,

Defendant.

#### MEMORANDUM DECISION

Filed : October 20, 1934.

C. J. Henderson, Mount Vernon, Washington.

Alfred McBee, Mount Vernon, Washington.

Attorneys for Plaintiff.

L. B. daPonte, Seattle, Washington,

Robert S. Macfarlane, Seattle, Washington.

Sawyer & Cluff, San Francisco, California.

Attorneys for Defendant. [43]

The Montborne Lumber Company, of which the plaintiff is receiver, procured a policy of insur-

ance from the defendant insuring the Lumber Company against loss or damage caused by fire, derailment or collision, collapse of bridges, lightning, cyclone, tornado and flood, covering a Shay locomotive engine owned by the Lumber Company valued at \$7,000.00, and twelve logging flat cars loaned by Northern Pacific Railway Company to the Lumber Company under a sort of license or bailment agreement requiring the Lumber Company to pay the Railway Company for all damages which the cars might sustain from any cause while in the possession of the Lumber Company. The policy had attached to it the following endorsement in writing: "It is also understood and agreed that this policy covers the legal liability only of the assured on logging cars owned by others \* \* \*".

While the policy was in force a forest fire destroyed bridges on the Lumber Company's railroad, marooning the locomotive up in the woods, and it would have cost more to repair the bridges for the purpose of bringing the locomotive out of the woods than the locomotive is worth, it being agreed that its value is \$7000.00. The total loss and damage caused by derailment and/or the fire to the logging flat cars belonging to the Railway Company was the total sum of \$8000.00. The locomotive itself was never in contact with the fire and sustained no physical damage as a result of the fire, but the destruction of the railroad bridges was caused by the fire.

The plaintiff, as receiver of the Lumber Company, sued the defendant under the policy for \$7000.00, the total value of the locomotive owned by it, and for [44] \$8000.00, the total loss and damage to the

logging flat cars owned by the Railway Company, alleging as to the flat cars "That as a result of said damage to said cars, the said assured has been and is now unable to return the same to the Northern Pacific Railway Company in as good condition as they were at the time of delivery to assured, or at all, and that by reason of said facts assured is legally liable to said Northern Pacific Railway Company in excess of \* \* \*". The case was tried before the court without a jury, on stipulated facts. The defendant has never paid anything on account of the locomotive, but the defendant settled with the Railway Company direct for the damage to the logging flat cars and the Railway Company filed in the receivership proceedings a release and discharge of the Lumber Company and its receiver, the plaintiff, in respect to any and all legal liability for and on account of the said cars.

As to the locomotive, the liability of the defendant Insurance Company in this case depends upon whether or not the loss or damage sued for (the total value of the locomotive) was proximately caused by the fire, which did no physical damage to the locomotive itself but which did destroy the bridges and thereby made it impossible to bring the locomotive out of the woods without rebuilding the bridges at a cost in excess of the value of the locomotive. The court is advised of no authority directly controlling, but the general rule, as stated in Ruling Case Law, is that "\* \* \* to render a fire the immediate or proximate cause of loss or damage, it is not necessary that any part of the insured property should be actually ignited or con-

sumed by fire. Insurance against loss by fire includes loss where the [45] cause insured against was the means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it or set it in motion." 14 R. C. L. 1216. To the same effect is Ermentraut v. Girard Fire Ins. Co. 65 N.W. 635 (Minn. 1895); see also Hall v. Great American Ins. Co. 252 N.W. 763 (Iowa 1934). It is also a fundamental principle of insurance law that "\* \* \* a loss by fire includes every loss necessarily following from the occurrence of a fire if it arises directly and immediately from the peril or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided \* \* \*", such as any and every expense borne by and chargeable upon the owner of a thing insured, as a direct and immediate consequence of the peril insured against. 6 Couch on Insurance, Sec. 1467, page 5304; Hale v. Washington Ins. Co., 11 Fed. Cases page 189, Case No. 5916.

In the absence of specific authority to the contrary, it seems to the court that the value of the locomotive itself has been as effectually destroyed by the destruction of the bridges and consequent marooning of the locomotive as if the fire had reduced to a molten mass, the component materials of the locomotive, that such destruction of the locomotive was caused directly and proximately by the fire, and that, contrary to defendant's contention, not merely the profitable use of the locomotive has been interrupted. The court so finds and concludes that

the defendant is liable to the plaintiff in the sum of \$7000.00 for the value of the locomotive.

As to the logging flat cars owned by the Railway Company, it seems to me that in the final analysis the [46] question of defendant's liability under the policy must turn upon the effect to be given to the endorsement on the policy that "It is also understood and agreed that this policy covers the legal liability only of the assured on logging cars owned by others \* \* \*". In the law relating to insurance as well as other contracts, the rule is that specific provisions must control over general provisions, and construing the policy, together with said endorsement, it is obvious that the parties intended that liability of the assured rather than loss or damage to the insured, was the thing insured against. By reason of the settlement of the question of damage to the cars made direct by the defendant with the Railway Company, and the release and discharge of the Lumber Company and the plaintiff receiver by the Railway Company, controlling evidence of which may be found by a reference to "Exhibit 3" attached to the stipulation of facts filed herein May 1, 1934, plaintiff has wholly failed to prove, what was required of him, that, as a result of the damage to the cars, assured is legally liable to the Railway Company in any sum. Plaintiff, therefore, has not sustained the burden of proof as to his claim or claims set forth in the complaint herein as to the cars, no matter on what theory, nor under what kind or nature of an insurance policy, such claim or claims may have been asserted. In fact, all of the proof on this question conclusively shows that the Lumber Company and plain-

tiff have no legal liability whatsoever to the Railway Company or the owner of the cars. It, therefore, is unimportant whether the policy was an indemnity, a liability, or a so-called "fire policy", because, as to the cars, plaintiff has proved no facts warranting recovery under any theory or under any kind of [47] policy. On this issue as to the cars, the judgment of the court will be for the defendant.

Counsel may propose appropriate findings, conclusions and judgment.

JOHN C. BOWEN  
United States District Judge."

Thereafter, on the 31st day of October, 1934, the said Honorable John C. Bowen made and entered an order extending time within which to serve, settle, file or sign Findings, Judgment and Bill of Exceptions, and extending the then term of court for said purpose, in words and figures as follows:

"In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20512

GUY H. CLARK, as Receiver of the Montborne Lumber Company a corporation,

Plaintiff,

vs.

NORTH RIVER INSURANCE COMPANY, a corporation,

Defendant.

### ORDER

This matter coming on to be heard on motion of plaintiff and defendant for extension of time to

serve, settle, file or sign findings, judgment and bill of exceptions, and for extension of term, and the court being fully advised in the premises,

NOW, THEREFORE, it is

ORDERED that the time of the plaintiff and defendant to serve, settle, file or sign findings, judgment and bill of exceptions herein be and the same is hereby extended [48] for ninety (90) days from October 31, 1934; and it is

Further ORDERED that the present term of this court be and the same hereby is extended for said purposes until the expiration of said ninety days.

DONE IN OPEN COURT this 31st day of October, 1934.

JOHN C. BOWEN  
District Judge

Presented by:—

ROBERT S. MACFARLANE  
At request of Alfred McBee,  
Attorney for Plaintiff.”

That thereafter on the 16th day of November, 1934, defendant, through its attorneys, served plaintiff with a copy of its proposed Findings of Fact and Conclusions of Law, which said proposed Findings of Fact and Conclusions of Law were signed by the court on January 14, 1935, pursuant to waiver of notice of presentation, in words and figures as follows:—

"In the District Court of the United States for  
the Western District of Washington, Northern  
Division.

No. 20512

GUY H. CLARK, as Receiver of the Montborne  
Lumber Company, a corporation,

Plaintiff,

v.

NORTH RIVER INSURANCE COMPANY, a  
corporation,

Defendant.

FINDINGS OF FACT and CONCLUSIONS OF  
LAW

The above entitled matter regularly coming on to be heard for the entry of Findings of Fact and Conclusions of Law, plaintiff appearing by his counsel, C. J. Henderson and Alfred McBee, and defendant appearing by its counsel, Sawyer & Cluff, L. B. daPonte and Robert S. Macfarlane, [49] and it appearing that the above entitled cause came on to be heard before the undersigned judge of the above entitled court on the 3rd day of October, 1934, and it further appearing that all of the facts were incorporated in written stipulations filed in the above entitled cause on the 1st day of May, 1934, and the 3rd day of October, 1934, and the parties having fully presented and argued the cause, and the court heretofore, to-wit, on October 20, 1934, having entered and filed its memorandum decision

herein, and the court being fully advised in the premises, now makes and enters the following

### FINDINGS OF FACT.

#### I.

That on or about August 11, 1930, a policy of insurance was effected by the Montborne Lumber Company, (hereinafter called Lumber Company), with the defendant, which policy of insurance is in words and figures as follows:—

No. 11187

THE NORTH RIVER INSURANCE COMPANY  
Of the City of New York.

---

Marine Department  
Appleton & Cox, Inc. Attorney  
No. 1 South William Street  
New York.

Incorporated 1822

Capital \$2,000,000

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND Of SIX HUNDRED THIRTY Dollars Premium

DOES INSURE MONTBORNE LUMBER COMPANY

From the 8th day of August, 1930, at noon,  
To the 8th day of August, 1931, at noon,  
Standard Time at place of insurance against direct loss or damage as hereinafter provided, to an

amount not exceeding TWENTY FIVE THOUSAND TWO HUNDRED DOLLARS, to Rolling Stock, as per schedule, including all appliances, apparatus, appurtenances, tools, spare and duplicate [50] parts and equipment of every kind and description while on or attached to said Rolling Stock, while located as described herein, and *no* elsewhere.

### 1. Territorial Limits.

This insurance covers only while the said Rolling Stock is in, on or about the Round House, Shops and Turntable of the Assured or connecting lines and/or upon the line of any road owned or leased by the Assured, and its branches, spurs, side tracks and yards and upon such extensions or branches as may be constructed and/or leased by the Assured during the term of this policy and on the line of any connecting road or roads, all situated in the State of WASHINGTON but it is warranted by the Assured to notify this Company, or the agent who shall have issued the policy, in writing of their intention to use such extensions or branches as may be constructed and/or leased by the Assured prior to operation.

### 2. Perils Insured Against

This Policy Insures only:—

Against loss or damage caused by fire, derailment or collision (coming together of cars and/or locomotive in shifting or coupling, not to be considered a collision), collapse of bridges, lightning, cyclone, tornado and flood.

It is understood and agreed that in the event of loss or damage to any part or parts of the within insured property resulting from any one accident from perils insured against, this Company shall only be liable for loss or damage in excess of Two Hundred Fifty Dollars (\$250.00).

### 3. Conditions

(a) Notwithstanding anything in this policy to the contrary, it is warranted by the assured free from claim for loss or damage, which may be attributed to, or arise from, the act of any person acting or claiming to act, under authority from any country or people, in a state of war (whether before or after declaration of war), revolution, or internal commotion, and also from all consequences of hostilities, civil commotions, riots, and/or war-like operations, even if by lawless or unauthorized persons.

(b) It is expressly stipulated and made a condition of this contract that, in event of loss, this Company shall be liable for no greater proportion thereof than the amount insured hereunder bears to NINETY per cent (90%) of the actual value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon.

(c) It is mutually understood and agreed that this Company shall not be liable beyond the actual

cash value of the interest of the Assured in the property at the time of loss or damage nor exceeding what it then cost the Assured to repair or replace the same with material of like kind and quality.

(d) In the event of any but a total loss under this policy, the amount of said loss for which this policy is liable shall be reinstated subject to all the conditions of the policy, the Assured warranting to pay pro rata premium upon the amount so reinstated from date of said loss. [51]

(e) This entire policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

(f) It is warranted by the Assured that in case of loss or damage happening to the property insured hereunder, the same shall be reported as soon as the loss is known or expected to the Head Office of this Company at San Francisco, or to the Agent who shall have issued this policy. All adjusted claims shall be due and payable thirty days after presentation and acceptance of proofs of interest and loss at the office of this Company. No loss shall be paid hereunder if the Assured has collected the same from others.

(g) In the event of loss or damage caused by the risks and perils insured against, it shall be necessary for the Assured to use all lawful and proper efforts for the safeguard and recovery of the property or its value without prejudice to this insurance, and this Company will contribute to the just and reasonable charges thereof in such proportion as the sum named in this policy bears to the whole value at risk. And it is mutually agreed that the acts of either party or their agents in securing, preserving or recovering the property insured shall not be considered or held to be either a waiver or acceptance of an abandonment.

(h) No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of Law or Equity unless the Assured shall have fully complied with all the foregoing requirements, nor unless commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

(i) No person shall be deemed an Agent of this Company unless specifically authorized in writing by this Company.

(j) It is also agreed that no assignment or transfer hereof shall in any case relieve the Assured of the property hereby insured from any or all the

conditions expressed in this policy, and that this policy shall be void in case of its being assigned or transferred without the written consent of this Company.

(k) This policy shall be cancelled at any time at the request of the Assured, or by this Company, by giving five (5) days' written notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, the premiums having been actually paid, the unearned portion shall be returned on surrender of the policy, this Company retaining the customary short rate, it being mutually understood and agreed however, that a minimum earned premium of \$472.50 dollars is guaranteed this Company, except that when this policy is cancelled by the Company by giving notice, it shall retain only the pro [52] rata premium.

(l) This insurance to be null and void to the extent of any other insurance specific or otherwise on the within described property which would attach and cover were it not for the fact of this insurance.

**Provisions Required by Law to Be Stated in This Policy:**—This policy is in a stock corporation, and is issued under and in pursuance of Section 130, 131 and 132 of the Insurance Law of the State of New York.

**IN WITNESS WHEREOF,** the undersigned, on behalf of the said Company, have subscribed their names, in the City of NEW YORK.

This policy is void unless countersigned by the authorized agent of this company at San Francisco, California.

APPLETON & COX, INC.

Attorney

DOUGLAS F. COX

President

(Marine Dept.)

AMERICAN INSURANCE

AGENCY

By F. A. FREDERICK

Agents.

Countersigned,

PACIFIC MARINE

INSURANCE AGENCY, INC.

By S. S. HANSEN

President

Date August 11th, 1930.

#### ENDORSEMENT

It is hereby understood and agreed that clause No. 2 of the policy to which this endorsement is attached is corrected to read as follows:

This Policy insures only against direct loss or damage by fire, derailment or collision, collapse of bridges, lightning, cyclone, tornado and flood.

It is hereby agreed that the term "Collision" as used herein, is defined as including only contact with objects, moving or stationary on rails, ties or roadbed, coming together of cars and/or locomotives in shifting or coupling being always excepted,

and excluding contact with any falling objects or any objects off the rails, ties or roadbed.

It is understood and agreed that in the event of loss or damage to any part or parts of the within insured property resulting from any one accident from perils insured against, \$250.00 shall be deducted from any claim on locomotives, \$250.00 from any other piece of equipment valued at \$7,500.00 or over, \$50.00 from any other piece of equipment valued at less than \$7,500.00, but not more than \$250.00, in any one accident.

All other terms and conditions remaining unchanged.

This slip is attached to and made a part of Policy No. 11187, issued to MONTBORNE LUMBER COMPANY by the NORTH RIVER INSURANCE COMPANY. [53]

Dated at SEATTLE, WASH. AUGUST 11th, 1930.

(Marine Dept.)  
AMERICAN INSURANCE  
AGENCY  
By F. A. FREDERICK  
Agents

#### ENDORSEMENT

It is also understood and agreed that this policy covers the legal liability only of the assured on logging cars owned by others in the possession of the assured, but it is a warranty of this insurance that the insured shall not have at risk an average of more than twelve (12) cars at any one time.

All other terms and conditions remaining unchanged.

This slip is attached to and forms part of Policy No. 11187 of the NORTH RIVER INSURANCE COMPANY issued to MONTBORNE LUMBER COMPANY.

Seattle, Wash. AUGUST 11th, 1930.

(Marine Dept.)

AMERICAN INSURANCE  
AGENCY

By F. A. FREDERICK

Agent

(Written on reverse side of Policy)

Each Unit Separately Insured

Amount

of

Trade	Year Name	Shop Built	Ton- Number	Insur- nage	Pre- mium
1	Shay loco-				
	motive	#2703	90 Ton	\$15,000.00	2½% \$375
12	CARS OWNED by any others than the Assured, consisting principally of Northern Pacific flat cars, main line tanks, and coal gondolas, being an equal amount of coverage on each				
				\$10,200.00	2½% \$255
	Total			\$25,200.00	\$630.

## II.

That the Lumber Company at all times herein in question was engaged in the business of logging near Montborne, Skagit County, Washington, and in connection with said operations said Lumber Company built a logging railroad back into the timber to the scene of its logging operations from the station of Montborne on the Seattle-Sumas main line of the Northern [54] Pacific Railway Company.

## III.

That on or about September 4, 1930, a forest fire broke out in the holdings of the Lumber Company and spread onto and over portions of the logging railroad owned and operated by the Lumber Company, destroying certain bridges and trestles of said logging railroad.

## IV.

That the Lumber Company owned a certain 90-ton Shay locomotive, shop No. 2703, which locomotive at the time of the fire heretofore mentioned was situated on the logging railroad in the woods; and that by reason of the aforementioned destruction of certain bridges and trestles on the logging railroad between the locomotive and Montborne station, the said locomotive was marooned. The locomotive itself was never in contact with the fire and sustained no physical damage as a result of the fire. The cost of sufficiently repairing the said bridges

and trestles in order to get the locomotive out of the woods and down to Montborne station would exceed the value of the locomotive. That at the time of the fire in question the reasonable market value of the said locomotive was \$7,000.00.

## V.

That the Northern Pacific Railway Company, (hereinafter called the Railway Company), is a corporation engaged in business as a common carrier railroad, and carries on its business in Skagit County and in the State of Washington and elsewhere. That the said Railway Company and the Lumber Company entered into a certain interchange agreement dated December 19, 1927, in words and figures as follows:— [55]

CONTRACT made this 19th day of December, A.D. 1927, between the NORTHERN PACIFIC RAILWAY COMPANY, a Wisconsin corporation, hereinafter called "Railroad" and the MONTBORNE LUMBER COMPANY, a Washington corporation, hereinafter called "Lumber Company."

In consideration of the mutual dependent promises stated in this contract the parties agree:—

## I.

Connections between the tracks of the parties hereto have been installed at Montborne, Washington, under the provisions of a contract between them dated November 22, 1926, and the parties agree to interchange carload business at such point through such connections.

## II.

The Lumber Company agrees to pay the Railroad for all damage which cars delivered to it by the Railroad through such connections may sustain from any cause whatever while in its possession and to indemnify and protect the Railroad against any claim for personal injury or death on account of alleged defects in such equipment and to return promptly all cars received from the Railroad and be governed by tariff provisions relating to demurrage.

GTR FRB WEC JEC AVB FEW

## III.

For the purpose of fixing liability for loss and damage to cars and their loads, cars and loads placed by the Railroad at the point of interchange for movement over the logging railroad of the Lumber Company or for the use of the Lumber Company shall be deemed to be in the Lumber Company's possession and to continue in its possession until the railroad shall move said cars from said point of interchange on to its own main track.

IN WITNESS WHEREOF the parties hereto have caused this contract to be executed by officers thereunto duly authorized on the day and year first above written.

NORTHERN PACIFIC  
RAILWAY COMPANY  
By F. F. WILLIAMSON  
Its Vice President

## WITNESSES:—

T. K. YOUNG

R. D. VAN VOORHIS

MONTBORNE LUMBER

COMPANY

By THOMAS SMITH

Its President

## WITNESSES:—

FRANK F. DAY

L. G. HARVEY

That said interchange agreement fully sets forth the rights and liabilities of the Lumber Company and the Railway Company with respect to cars and equipment belonging to the Railway Company used by the Lumber Company, which said agreement was in full force and effect at all times material to [56] this litigation.

## VI.

That on August 11, 1930, and for a long time prior thereto, and until the time of the fire before mentioned, the Railway Company furnished the Lumber Company its flat cars, main line tanks and coal gondolas for the purpose of loading and/or unloading freight under said interchange agreement; that the Lumber Company did not own any logging flat cars, main line tanks or coal gondolas, and that all rolling equipment of said character used or intended to be used at any time material to this litigation upon the logging railroad of the Lumber Company was rolling equipment owned

by the Railway Company and furnished pursuant to the said interchange agreement.

### VII.

That it was the practice and procedure of both parties under the interchange agreement for the Railway Company to deliver empty logging flat cars to the Lumber Company upon the siding at Montborne station; that thereafter the Lumber Company, with its own locomotive, took said logging flat cars from said siding over its logging railroad into the timber to the scene of its operations for the purpose of loading; that after loading, the logging flat cars were thereupon taken by the locomotive of the Lumber Company back to the siding at Montborne station, from which siding said cars were picked up by the Railway Company for further transportation over its railroad to destination.

### VIII.

That this practice and procedure and this form of interchange agreement, with substantially identical provisions, was usual and customary between logging railroads and common carrier railroads in Western Washington at all times [57] material to this litigation.

### IX.

That on or about August 30, 1930, five certain logging flat cars, (N.P. 120753, N.P. 121526, N.P. 121012, N.P. 121969, N.P. 120539), belonging to

the Railway Company and in the possession of the Lumber Company pursuant to the terms of the interchange agreement, were derailed, and that by reason of said derailment were damaged in the amount of \$482.13, which damage was fully repaired by the Railway Company at its expense.

## X.

That on or about September 4, 1930, said cars which had been derailed and repaired, together with other logging flat cars, (N.P. 120107, N.P. 121134, N.P. 122087, N.P. 121041, N.P. 121683, N.P. 120411, N.P. 121116, N.P. 120880, N.P. 121447, N.P. 121818, N.P. 120565, N.P. 121275, N.P. 121379, N.P. 121385, N.P. 122011, N.P. 121742 and N.P. 119222), totalling 22 logging flat cars, were destroyed by the forest fire heretofore mentioned, which said logging flat cars were the property of the Railway Company, and were in the possession of the Lumber Company pursuant to the terms of the interchange agreement heretofore mentioned.

## XI.

That no flat cars, main line tanks or coal gondolas other than those herein described belonging to others than the Lumber Company were upon the logging railroad or in the possession of the Lumber Company at the time of the fire.

## XII.

That the loss and damage caused by derailment

and/or fire to all of said cars was in the total sum of \$8,000.00 [58]

### XIII.

That shortly after the said fire said Lumber Company became hopelessly insolvent and went into receivership and plaintiff is now the receiver of said Lumber Company, liquidating the same.

### XIV.

That on or about January 20, 1931, there was filed in the proper proceeding involving the insolvency and receivership of the Lumber Company, a claim by the Northern Pacific Railway Company against the Lumber Company, which said claim is in words and figures as follows:—

In the Superior Court of the State of Washington  
in and for Skagit County.

No. 13524

ROY VAN MAREN,

Plaintiff,

vs.

MONTBORNE LUMBER COMPANY,  
a corporation,

Defendant.

CLAIM OF NORTHERN PACIFIC RAILWAY  
COMPANY

Pursuant to the court's order and the notice of receivers dated the 21st day of October, 1930, that

claims duly verified with proper vouchers attached be presented on or before January 24, 1931, the Northern Pacific Railway Company states the following:—

There is attached hereto a statement in detail with vouchers attached showing an amount of \$6,177.40 due from the Montborne Lumber Company to Northern Pacific Railway Company on account of the items shown in the detailed statement and vouchers attached hereto, and said details and vouchers are self-explanatory.

In addition to said amount, the Montborne Lumber Company has in its possession 20 cars belonging to the Northern Pacific Railway Company delivered by claimant to said Montborne Lumber Company under the interchange contract dated the 19th day of December, 1927, a copy of which is in the possession of the Montborne Lumber Company. Said cars [59] have been more or less damaged as shown by the statement hereto attached. Claimant states that there is a policy of insurance on said cars, or some of them, issued to Montborne Lumber Company by the North River Insurance Company, and this company claims that said policy inures to its benefit and that it is entitled to the protection of said policy on said cars and to the money due thereon. Claimant has not received any sums on account of said insurance and cannot state when it will receive anything thereon, nor the amount thereof, and therefore cannot at this time

state what balance will be due from the Montborne Lumber Company and its receivers on account of the damage or destruction of said cars. Claimant further shows that there will be salvage from said cars, which should be deducted from said account, but cannot state at this time what the amount of said salvage will be, nor the cost of recovering said cars. Claimant will file an amended claim at a later date showing the balance due from the Montborne Lumber Company on account of said cars after deducting the amount claimant receives from the said Insurance Company and the salvage therefrom, if any.

Dated at Seattle, Washington, this 19th day of January, 1931.

NORTHERN PACIFIC  
RAILWAY COMPANY

By: L. B. daPONTE

THOS. H. MAGUIRE  
Its Attorneys.

State of Washington  
County of King—ss.

L. B. daPonte, being first duly sworn, on oath deposes and says:—That he is one of the attorneys for the claimant in the above entitled action; that the same is a foreign corporation, and he makes this verification for and in its behalf, being authorized so to do; that he has read the above and foregoing claim of the Northern Pacific Railway Com-

pany, knows the contents thereof, and believes the same to be true.

L. B. daPONTE

Subscribed and sworn to before me this 19th day of January, 1931.

BRUCE JENNINGS

Notary Public in and for the State of Washington, residing at Seattle, Wash. [60]

LIST OF 20 FLAT CARS DESTROYED OR  
DAMAGED BY FIRE, WHILE ON THE  
MONTBORNE LUMBER COMPANY'S  
TRACKS OR POSSESSION, SEPTEMBER  
5, 1930.

Car No	Date Built	Original cost	Depreciated Value	Estimated value before damage	Extent Damaged	
					Extent	Damaged
120411	1906	598.36	225.73	500.00	Sills burned,	cannot move.
121447	1927	1220.99	1035.17	11.00.00	"	"
121818	1927	1207.15	1069.90	1100.00	"	"
119222	1906	603.61	237.79	500.00	"	"
120880	1902	572.77	225.73	500.00	"	"
121116	1926	1249.16	1023.61	1100.00	"	"
120771	1901	549.11	225.64	500.00	"	"
120187	1906	596.27	231.85	500.00	"	"
122011	1927	1207.15	1068.90	1100.00	"	"
121385	1926	1241.17	1021.85	1100.00	"	"
121379	1926	1241.17	1021.85	1100.00	"	"
120565	1900	807.15	405.19	500.00	"	"
121683	1927	1220.99	1035.16	1100.00	Sills damaged,	can be moved.
121041	1926	1241.15	1015.60	1100.00	"	"
122087	1927	1207.15	1068.89	1100.00	"	"
121731	1927	1207.15	1068.90	1100.00	"	"
121134	1926	1249.16	1023.60	1100.00	"	"
121275	1927	1241.17	1021.86	1100.00	Broken brk cyl.	"
121475	1927	1220.99	1035.17	1100.00	O. K.	
121742	1927	1207.15	1068.90	1100.00	Totally destroyed.	

20879.97 16131.29 18400.00

St. Paul, Minn.

Sept. 30, 1930.

That the detailed statement and voucher referred to in Paragraph 2 of said claim refer to demurrage and other items not material to the present litigation and are therefore by agreement of counsel eliminated therefrom.

## XV.

That on or about November 28, 1931, there was properly and timely filed in the proper proceeding involving the insolvency and receivership of the Lumber Company, a waiver and release of the claims of the Railway Company against the Lumber Company on account of any legal liability or otherwise for damage to any of said logging flat cars for any cause whatsoever, which waiver and release of claims [61] designated "Amended Claim of the Northern Pacific Railway Company" is in words and figures as follows:—

In the Superior Court of the State of Washington  
in and for Skagit County.

No. 13524

ROY VAN MAREN,

Plaintiff,

vs.

MONTBORNE LUMBER COMPANY,  
a corporation,

Defendant.

**AMENDED CLAIM OF NORTHERN PACIFIC  
RAILWAY COMPANY**

The Northern Pacific Railway Company states that it has received payment of the sum of \$8,000.00

from North River Insurance Company on account of the twenty cars belonging to said railway company delivered by it to the Montborne Lumber Company under the interchange contract dated the 19th day of December, 1927, referred to in its original claim. It states that it has no claim and makes no claim against the Montborne Lumber Company, or the Receiver of said company for and on account of said twenty cars, or any of them.

The Northern Pacific Railway Company further states that it neither has nor makes any claim against said Montborne Lumber Company or said receiver for or on account of any legal liability, or otherwise, for damage to or failure to return cars 120107, 121134, 122087, 121041, 121683, 120411, 121116, 120880, 121447, 121818, 120565 and 121275, and releases and discharges said Montborne Lumber Company and its receiver from any and all legal liability for or on account of damage to said cars or failure to return the same pursuant to the interchange contract above referred to, or otherwise.

The Northern Pacific Railway Company further states that it has no claim and makes no claim against said Montborne Lumber Company for and on account of any damage to or failure to return cars 120753, 121526, 121012, 121969 and 120539, and releases and discharges said Montborne Lumber Company and its receiver from any and all liability for and on account of damage to said cars or any of them, or failure to return the same, or any of them, as provided by said interchange contract, or otherwise.

The Northern Pacific Railway Company further states that it has no claim and makes no claim against said Montborne Lumber Company for and on account of any damage to or failure to return cars 121379, 121385, 122011, 121742 and 119222, and releases and discharges said Montborne Lumber Company and its receiver from any and all liability for and on account of damage to said cars or any of them, or failure to return the same, or any of them, as provided by said interchange contract, or otherwise. [62]

The claim of the Northern Pacific Railway Company is hereby limited to the items shown in its original claim, to-wit:—for freight and demurrage \$1935.26; for bills rendered as per statement in the sum of \$4072.70 less bill No. 89754 in the sum of \$428.13, which item is excluded from the above, and the item of indebtedness incurred subsequent to appointment of the receiver in the sum of \$169.44.

The total claim of the Northern Pacific Railway Company, which is justly due and unpaid, is the sum of \$5695.27, to which sum its said original claim is hereby amended.

Dated at Seattle, Washington, this 17th day of November, 1931.

NORTHERN PACIFIC  
RAILWAY COMPANY  
By: L. B. daPONTE and  
THOS. H. MAGUIRE  
Its Attorneys

State of Washington  
County of King—ss.

L. B. daPonte, being first duly sworn, on oath deposes and says:—That he is one of the attorneys for claimant in the above entitled action; that the same is a foreign corporation, and he makes this verification for and in its behalf, being authorized so to do; that he has read the above and foregoing amended claim of Northern Pacific Railway Company, knows the contents thereof, and believes the same to be true.

L. B. daPONTE

Subscribed and sworn to before me this 17th day of November, 1931.

BRUCE JENNINGS

Notary Public in and for the State of Washington, residing at Seattle

Received a copy of the foregoing amended claim this 28th day of November, 1931.

(Sgd.) C. J. HENDERSON

By A. McBEE

That the cars itemized and listed in said amended claim are the cars damaged by derailment and fire as heretofore described herein; that the amounts claimed as shown in the last [63] two paragraphs of said amended claim are in addition to all loss or damage on account of the said logging flat cars, that said items are immaterial to this litigation, and refer to demurrage and other like charges.

**XVI.**

That the defendant Insurance Company paid to the Railway Company on February 26, 1931 the sum of \$8,000.00 in full settlement and satisfaction of any and all claims said Railway Company might have against it or the Lumber Company or on account of the damage to or destruction or loss of any and all cars of said Railway Company covered by the said policy of insurance; that said settlement and satisfaction made by the defendant Insurance Company was without the consent of the receiver.

**XVII.**

By reason of all of the foregoing, the defendant Insurance Company has refused to pay or recognize the claim of the Lumber Company now being prosecuted seeking \$7,000.00, because of the aforesaid Shay locomotive and \$8,000.00 because of the derailment and burning of the aforesaid logging flat cars.

**DONE IN OPEN COURT this 14 day of January, 1935.**

**JOHN C. BOWEN**

**District Judge**

**Notice of Presentation Waived**

**C. J. HENDERSON**

**ALFRED McBEE**

**Attys. for Pltf.**

**Presented:—**

**ROBERT S. MACFARLANE**

From the foregoing Findings of Fact, the court makes and enters the following [64]

## CONCLUSIONS OF LAW

## I.

Plaintiff is entitled to judgment against the defendant for the sum of Seven Thousand Dollars (\$7,000.00), together with interest from date thereof, together with his costs and disbursements as provided by law.

To the foregoing Conclusion of Law the defendant excepts and its exception is by the court allowed.

DONE IN OPEN COURT this 14 day of January, 1935.

JOHN C. BOWEN

District Judge

Presented by:—

ROBERT S. MACFARLANE

Notice of Presentation Waived.

C. J. HENDERSON

ALFRED McBEE

That on aforesaid 14th day of January, 1935, when the matter of signing Findings of Fact, Conclusions of Law and Judgment came on to be heard before the court, defendant presented to the court its motion theretofore served on attorneys for plaintiff for entry of Conclusions of Law and Judgment as thereto attached, which said motion and conclusions of law and judgment attached are in words and figures as follows:—

"In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20512

GUY H. CLARK, as Receiver of the Montborne Lumber Company, a corporation,

Plaintiff,

vs.

NORTH RIVER INSURANCE COMPANY,  
a corporation,

Defendant.

MOTION FOR THE ENTRY OF CONCLUSIONS OF LAW AND JUDGMENT [65]

Comes now the defendant and moves the court for the entry of the hereto attached conclusions of law and judgment.

Dated this 14th day of January, 1935.

L. B. daPONTE,  
SAWYER & CLUFF and  
ROBERT S. MACFARLANE  
Attorneys for Defendant.

Service of copy of the above motion, and attached Conclusions of Law and Judgment is hereby acknowledged this 14th day of January, 1935, by receipt this date of true and correct copies thereof.

C. J. HENDERSON  
ALFRED McBEE  
Attorneys for Plaintiff.

Motion denied, Jan. 14, 1935.

JOHN C. BOWEN,

Judge"

(Attached to Motion)

"In the District Court of the United States for  
the Western District of Washington, Northern  
Division.

No. 20512

GUY H. CLARK, as Receiver of the Montborne  
Lumber Company, a corporation,

Plaintiff,

v.

NORTH RIVER INSURANCE COMPANY,  
Defendant.

**CONCLUSIONS OF LAW**

From the Findings of Fact heretofore made and entered herein, the court here now deduces the following [66]

**CONCLUSIONS OF LAW**

Defendant is entitled to judgment of dismissal together with its costs and disbursements as provided by law.

To the foregoing conclusion of law the plaintiff excepts and its exception hereby allowed.

Done in open court this 14th day of January, 1935.

---

---

---

District Judge

Presented by:—

---

---

---

Attorney for Defendant

Presented to and refused by the Court Jan. 14,  
1935.

JOHN C. BOWEN

Judge."

(Attached to Motion)

"In the District Court of the United States for  
the Western District of Washington, Northern  
Division.

No. 20512.

GUY H. CLARK, as Receiver of the Montborne  
Lumber Company, a corporation,

Plaintiff,

v.

NORTH RIVER INSURANCE COMPANY.  
a corporation,

Defendant.

### JUDGMENT

This matter coming on regularly to be heard upon application of the defendant, for the entry of judgment herein, the cause having been heretofore tried by the court without a jury on October 3, 1934, upon a stipulation of facts on file herein, and the court, having heretofore filed its memorandum decision herein, and the court having on this 14th day of January, 1935, [67] made and entered its findings of fact and conclusions of law, the plaintiff appearing by his counsel, C. J. Henderson and Alfred McBee, and the defendant appearing by its counsel, Sawyer & Cluff, L. B. daPonte and Robert S. MacFarlane, and the court being fully advised in the premises;

It is therefore ORDERED, ADJUDGED and DECREED that the complaint of the plaintiff

herein be dismissed, and that defendant have and recover of and from the plaintiff its costs and disbursements as provided by law.

Exceptions allowed to plaintiff.

DONE IN OPEN COURT this 14th day of January, 1935.

---

District Judge

Presented by:—

---

Attorney for Defendant.

Presented to and refused by the Court, Jan. 14, 1935.

JOHN C. BOWEN

Judge.”

That further on aforesaid January 14, 1935, the said Honorable John C. Bowen made and entered an order denying said motion of the defendant for the entry of Conclusions of Law and Judgment, which order is in words and figures as follows:—

“In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20512

GUY H. CLARK, as Receiver of the Montborne Lumber Company, a corporation,

Plaintiff,

v.

[68]

NORTH RIVER INSURANCE COMPANY,  
a corporation,

Defendant.

ORDER.

This matter regularly coming on to be heard be-

fore the undersigned judge of the above entitled court upon motion interposed by plaintiff for the entry of conclusions of law and judgment, and motion interposed by the defendant for the entry of conclusions of law and judgment, and the court being fully advised in the premises,

**NOW, THEREFORE, it is**

**ORDERED** that the motion of the plaintiff for the entry of conclusions of law and judgment be and the same hereby is denied, and exception allowed; and it is further

**ORDERED** that the motion of the defendant for the entry of conclusions of law and judgment be and the same hereby is denied, and exception allowed.

**DONE IN OPEN COURT** this 14th day of January, 1935.

**JOHN C. BOWEN**

**District Judge**

Presented by:—

SAWYER & CLUFF,  
L. B. daPONTE,  
ROBERT S. MACFARLANE  
C. J. HENDERSON,  
ALFRED McBEE" [69]

That on the aforesaid 14th day of January, 1935, when the matter of signing Findings of Fact, Conclusions of Law and Judgment came on to be heard

before the court, the plaintiff presented to the court its motion, theretofore served upon the attorneys for the defendant, for entry of conclusions of law and judgment as thereto attached, which said motion and conclusions of law and judgment are in words and figures as follows:—

“In the District Court of the United States for the Western District of Washington, Northern Division.

GUY H. CLARK, as Receiver of the Montborne Lumber Company, a corporation,

Plaintiff,

v.

NORTH RIVER INSURANCE COMPANY,  
a corporation,

Defendant.

MOTION FOR THE ENTRY OF CONCLUSIONS OF LAW AND JUDGMENT.

Comes now the Plaintiff and moves the court for the entry of the hereto attached Conclusions of Law and Judgment.

Dated this 14th day of January, 1935.

C. J. HENDERSON

ALFRED McBEE

Attorneys for Plaintiff  
Mount Vernon, Washington

Service of copy of the above motion and attached Conclusions of Law and Judgment is hereby

acknowledged this 14th day of January, 1935, by receipt this date of true and correct copies thereof.

SAWYER & CLUFF

L. B. daPONTE

ROBERT S. MACFARLANE

Attorneys for Defendant.

Motion denied, Jan. 14, 1935.

JOHN C. BOWEN,

Judge. [70]

(Attached to Motion)

"In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20512

GUY H. CLARK, as Receiver of the Montborne Lumber Company, a corporation,

Plaintiff,

v.

NORTH RIVER INSURANCE COMPANY,  
a corporation,

Defendant.

#### CONCLUSIONS OF LAW.

From the Findings of Fact heretofore made and entered herein, the court here now deduces the following

#### CONCLUSIONS OF LAW

Plaintiff is entitled to judgment against the defendant in the sum of FIFTEEN THOUSAND DOLLARS (\$15,000.00), together with interest from the date hereof, together with his costs and disbursements as provided by law.

To the foregoing conclusion of law the defendant excepts and its exception is hereby allowed.

Done in open court this 14th day of January, 1935.

---

District Judge

Presented by:—

C. J. HENDERSON

ALFRED McBEE,

Attorneys for Plaintiff

Presented to and refused by the Court Jan. 14, 1935.

JOHN C. BOWEN,

Judge.” [71]

(Attached to Motion)

“In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20512

GUY H. CLARK, as Receiver of the Montborne Lumber Company, a corporation,

Plaintiff,

v.

NORTH RIVER INSURANCE COMPANY,  
a corporation,

Defendant.

JUDGMENT

This matter coming on regularly to be heard upon application of the plaintiff, for the entry of judgment herein, the cause having been heretofore tried by the court without a jury on October 3, 1934, upon a stipulation of facts on file herein, and the

court, having heretofore filed its memorandum decision herein, and the court having on this 14th day of January, 1935 made and entered its findings of fact and conclusions of law, the plaintiff appearing by his counsel, C. J. Henderson and Alfred McBee, and the defendant appearing by its counsel Sawyer and Cluff, L. B. daPonte and Robert S. Macfarlane, and the court being fully advised in the premises:—

It is therefore ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendant the sum of **FIFTEEN THOUSAND DOLLARS (\$15,000.00)** together with interest at the rate of Six per cent (6%) from the date hereof, together with his costs and disbursements as provided by law.

Exceptions allowed to defendant.

Done in open court this 14th day of January, 1935.

---

District Judge

Presented by:—

**C. J. HENDERSON**

**ALFRED McBEE**

Attorneys for Plaintiff

Presented to and refused by the Court, Jan. 14, 1935.

**JOHN C. BOWEN,  
Judge.” [72]**

I, the undersigned United States District Judge, who presided at the trial of the above entitled cause, do hereby certify that the foregoing bill of excep-

tions contains all of the material facts, matters, things, proceedings, rulings, and exceptions thereto, occurring upon the trial of said cause, and not heretofore a part of the record herein, including all evidence adduced at the said trial; and I further certify that the exhibits set forth or referred to, or both, in the foregoing bill of exceptions, constitute all of the exhibits offered in evidence in the said trial, and I hereby make all of said exhibits a part of the foregoing bill of exceptions; and I hereby settle and allow the foregoing bill of exceptions as a full, true, and correct bill of exceptions in this cause and order the same filed as part of the record herein, and further order the clerk of this court to attach to the said bill of exceptions, all of the said exhibits not set forth therein; and to transmit said entire bill of exceptions, including all exhibits whatsoever, to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that the foregoing bill of exceptions contains all orders made by me extending the time and term for the presentation, settling and filing the bill of exceptions, and that the foregoing bill of exceptions is presented, settled and allowed within the time prescribed for that purpose.

Dated this 28 day of January, 1935.

JOHN C. BOWEN  
United States District Judge

[Endorsed]: Lodged Jan 16 1935

[Endorsed]: Filed Jan. 28 1935 [73]

[Title of Court and Cause.]

**PETITION FOR APPEAL.**

To the Honorable John C. Bowen, District Judge:

The above-named defendant, NORTH RIVER INSURANCE COMPANY, a corporation, feeling aggrieved by the judgment made and entered in the above-entitled cause on the 14th day of January, 1935, does hereby appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which the said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, under the rules of such court in such case made and provided.

And your petitioner further prays that upon its giving a bond in an amount to be fixed by this Court, the said appeal may operate as a supersedeas and may suspend, during the pendency of said appeal, execution of said judgment.

**DATED: March 1, 1935.**

**SAWYER & CLUFF**

**L. B. DaPONTE**

**ROBERT S. MACFARLANE**

**Attorneys for Defendant.**

[Endorsed]: Filed Mar. 1, 1935 [74]

[Title of Court and Cause.]

### ASSIGNMENT OF ERRORS.

North River Insurance Company, a corporation, the defendant herein, asserts that in the record and proceedings in the above-entitled cause, and in the final judgment entered herein, there is manifest error in the following particulars:

**FIRST:** The Court erred in denying defendant's motion made October 3, 1934, for findings and declaration of law in its favor.

**SECOND:** The Court erred in denying defendant's motion made January 14, 1935, for the entry, upon the findings, of a conclusion of law that defendant is entitled to judgment of dismissal, together with costs and disbursements as provided by law, and for entry of judgment for defendant pursuant to such conclusion, to which denial defendant duly excepted and its exception was allowed.

**THIRD:** The Court erred in entering judgment herein for the plaintiff in the sum of Seven Thousand dollars (\$7,000.00) for the reason that the judgment is not supported by the findings, and particularly that portion of Finding No. IV which declares that the locomotive itself was never in contact with the fire and sustained no physical damage as a result of the fire, to the entry of which judgment defendant duly excepted and its exception was allowed.

**FOURTH:** The Court erred in construing the insurance policy in this case as covering a loss of the insured locomotive when the said locomotive

had suffered no physical damage whatever as a result of the fire or as a result of any other peril insured against.

FIFTH: The Court erred in holding that said locomotive was a total loss by fire within the meaning of said insurance policy.

SIXTH: The Court erred in holding that the fire was the proximate cause of the loss of the locomotive.

SEVENTH: The Court erred in holding that the said locomotive was a total loss by fire.

EIGHTH: The Court erred in holding that the locomotive had sustained any loss or damage whatsoever as a result of fire. [75]

NINTH: The Court erred in construing the insurance policy to cover loss of use of the locomotive.

TENTH: The Court erred in holding the defendant liable upon a contract of insurance for which there was no consideration.

WHEREFORE, said defendant prays that said judgment be reversed and that the District Court be directed by the Circuit Court of Appeals for the Ninth Circuit, to enter a judgment in said cause in favor of said defendant.

DATED Mar. 1, 1935.

SAWYER & CLUFF

L. B. daPONTE

ROBERT S. MACFARLANE

Attorneys for Defendant.

[Endorsed]: Filed Mar. 1, 1935 [76]

[Title of Court and Cause.]

**ORDER ALLOWING APPEAL.**

On motion of Robert S. Macfarlane, of attorneys for defendant, IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore made and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of Eight thousand Dollars (\$8,000.00), the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

DATED: March 1, 1935.

**JOHN C. BOWEN**

District Judge.

[Endorsed]: Filed March 1, 1935 [77]

---

[Title of Court and Cause.]

**SUPERSEDEAS AND COST BOND ON  
APPEAL.**

KNOW ALL MEN BY THESE PRESENTS:

That we, NORTH RIVER INSURANCE COMPANY, a corporation, as principal, and INDEMNITY INSURANCE COMPANY OF NORTH

AMERICA, a corporation, as surety, are held and firmly bound unto GUY H. CLARK, as Receiver of the Montborne Lumber Company, a corporation, in the full and just sum of Eight thousand Dollars (\$8,000.00), to be paid to the said Guy H. Clark, as Receiver of the Montborne Lumber Company, a corporation, his heirs, executors, administrators and assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally, firmly by these presents.

IN TESTIMONY WHEREOF, North River Insurance Company has caused this instrument to be executed on its behalf and in its name by Ward Jackson, its attorney-in-fact, and said Indemnity Insurance Company of North America has likewise caused this instrument to be executed on its behalf and in its name by Harry C. Miller, its attorney-in-fact, and its corporate seal to be hereon set, all on the 19th day of February, 1935.

WHEREAS, lately at a District Court of the United States for the Western District of Washington, Northern Division, in an action pending in said court between Guy H. Clark, as Receiver of the Montborne Lumber Company, a corporation, as plaintiff, and North River Insurance Company, a corporation, as defendant, a judgment was rendered on the 14th day of January, 1935, against said North River Insurance Company and said North River Insurance Company is about to petition for an allowance of an appeal and file a copy thereof in the Clerk's office of the said court to reverse the

judgment in the said action, and a citation will thereafter be directed to the said Guy H. Clark, as Receiver of the Montborne Lumber Company, a corporation, citing and admonish- [78] ing him to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, in the State of California, on a day certain to be fixed by the court, and within thirty days from and after the date of said citation.

NOW, the condition of the above obligation is such that if the said North River Insurance Company shall prosecute its said appeal to effect and answer all damages and costs, if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

NORTH RIVER  
INSURANCE COMPANY  
By WARD JACKSON  
Its Attorney-in-fact

[Seal] INDEMNITY INSURANCE  
COMPANY OF NORTH  
AMERICA  
By HARRY C. MILLER  
Its Attorney-in-fact

Approved March 1, 1935.

JOHN C. BOWEN  
Judge of the District Court of the United  
States for the Western District of Wash-  
ington, Northern Division.

State of California

City and County of San Francisco—ss.

On this 19th day of February, 1935, before me, Lulu P. Loveland, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared WARD JACKSON, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of NORTH RIVER INSURANCE COMPANY, and acknowledged to me that he subscribed the name of North River Insurance Company thereto as principal, and his own name as Attorney-in-fact.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, all on the day and year in this certificate first above written.

[Seal]                    **LULU P. LOVELAND**

Notary Public in and for the City and County  
of San Francisco, State of California [79]

State of California,

City and County of San Francisco—ss.

On this 19th day of February, 1935, before me, Lulu P. Loveland, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared HARRY C. MILLER, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, and acknowledged

to me that he subscribed the name of Indemnity Insurance Company of North America thereto as surety, and his own name as Attorney-in-fact.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, all on the day and year in this certificate first above written.

[Seal]                    LULU P. LOVELAND

Notary Public in and for the City and County  
of San Francisco, State of California.

[Endorsed]: Filed Mar. 1, 1935 [80]

---

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.  
TO THE CLERK OF THE ABOVE-ENTITLED  
COURT:

You are requested to take a transcript of the record and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, omitting all captions and endorsements, verifications, etc., but containing all proofs of service, and to include in such transcript of record the following and no other papers, that is to say:

1. Summons.
2. Complaint.
3. Petition for Removal.
4. Notice of Intention to file Petition and Bond for Removal.
5. Bond on Removal.
6. Order of Removal.

7. Answer.
8. Bill of Exceptions.
9. Assignment of Errors.
10. Petition for Appeal.
11. Order Allowing Appeal and fixing Amount of Cost and Supersedeas Bond.
12. Cost and Supersedeas Bond.
13. Citation and Proof of Service.
14. Praeclipe and Proof of Service.
15. Your Certificate.

SAWYER & CLUFF

L. B. daPONTE

ROBERT S. MACFARLANE

Attorneys for Defendant.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this court.

C. J. HENDERSON

ALFRED McBEE

Attorneys for Plaintiff.

SAWYER & CLUFF

ROBERT S. MACFARLANE

Attorneys for defendant.

Service hereof admitted this 11 day of March, 1935.

C. J. HENDERSON &

ALFRED McBEE

Attorneys for Plaintiff

[Endorsed]: Filed Mar. 13, 1935 [81]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT ON APPEAL.

United States of America,  
Western District of Washington—ss:

I, Edgar M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 81, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, (with the exception of the Summons as requested in said praecipe, none having been included in the transcript on removal from Skagit County to this Court), as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return

to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return folios at 15c	\$ 34.50
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
<hr/>	
Total	40.00
[82]	

I hereby certify that the above cost for preparing and certifying record, amounting to \$40.00, has been paid to me by the attorneys for the appellant.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District, this 29th day of March, 1935.

[Seal] **EDGAR M. LAKIN**  
Clerk United States District Court for the  
Western District of Washington,  
By **TRUMAN EGGER**  
Deputy. [83]

---

[Title of Court and Cause.]

#### **CITATION AND NOTICE ON APPEAL**

To Guy H. Clark, as Receiver of the Montborne Lumber Company, a corporation, and to Alfred

McBee, Esq., and C. J. Henderson, Esq., attorneys for Guy H. Clark,

GREETING:—

YOU ARE HEREBY NOTIFIED, that in a certain action at law in the District Court of the United States for the Western District of Washington, Northern Division, wherein Guy H. Clark, as Receiver of the Montborne Lumber Company, a corporation, is plaintiff, and North River Insurance Company, a corporation, is defendant, an appeal has been allowed to the defendant therein to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said court at the City and County of San Francisco, State of California, on the 31st day of March next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Seattle, in the Ninth Circuit, this 1st day of March in the year of our Lord one thousand nine hundred and thirty-five.

[Seal]

JOHN C. BOWEN

Judge of the District Court of the United States, for the Western District of Washington, Northern Division. [84]

Due service of the within Citation and Notice on Appeal and receipt of copy thereof is hereby admitted and acknowledged on behalf of Guy H. Clark,

as Receiver of the Montborne Lumber Company, a corporation, appellee, this 4 day of March, 1935.

C. J. HENDERSON &  
ALFRED McBEE

Attorneys for Appellee.

[Endorsed]: Filed Mar. 13, 1935 [85]

---

[Endorsed]: No. 7820. United States Circuit Court of Appeals for the Ninth Circuit. North River Insurance Company, a corporation, Appellant, vs. Guy H. Clark, as Receiver of the Montborne Lumber Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 1, 1935.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

---

[Title of Court and Cause.]

**PETITION FOR CROSS APPEAL.**

To the Honorable John C. Bowen, District Judge:

The above named plaintiff, Guy H. Clark, as receiver of the Montborne Lumber Company, a corporation, feeling aggrieved by the judgment made and entered in the above entitled cause on the 14th day of January, 1935, does hereby cross appeal from

said judgment to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in cross appellant's assignment of errors filed herewith, and prays that his cross appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which the said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, under the rules of such court in such case made and provided.

And your petitioner further prays that upon his giving a bond in the amount to be fixed by this court, the said cross appeal may operate as a supersedeas and may suspend, during the pendency of said appeal, execution of said judgment.

DATED this 11th day of April, 1935.

HENDERSON and McBEE

Attorneys for Plaintiff

618 First Street, Mount Vernon, Washington

[Endorsed]: Filed Apr 11 1935 [86]

---

[Title of Court and Cause.]

CROSS APPELLANT'S ASSIGNMENT OF  
ERRORS.

Comes now the plaintiff and cross appellant herein, Guy H. Clark, as receiver of the Montborne Lumber Company, a corporation, and asserts that in the record and proceedings in the above

entitled cause, and in the final judgment herein, there is manifest error in the following particulars:

FIRST: The court erred in denying plaintiff's motion made January 14, 1935, for the entry upon the findings of a conclusion of law that the plaintiff is entitled to judgment against the defendant in the sum of \$15,000.00, together with interest from the date thereof, and with plaintiff's costs and disbursements as provided by law, and for entry of judgment for the plaintiff for said sums pursuant to such conclusion, to which denial plaintiff duly excepted and which exception was regularly allowed.

SECOND: The court erred in construing the insurance policy in this case as not requiring the defendant to pay to the plaintiff \$8000.00, for which the plaintiff was liable to the *North Pacific Railroad*.

THIRD: The court erred in construing the policy of insurance in this case as an indemnity or liability policy instead of a fire insurance policy.

FOURTH: The court erred in holding that the payment by the defendant to the *North Pacific Railroad Company* was an accord and satisfaction of the policy of insurance in this case.

FIFTH: The court erred in holding that the parties to the insurance policy intended that the liability of the insured, rather than the loss or damage to the insured was the thing insured against.

SIXTH: The court erred in holding that as to plaintiff's claimed recovery for damages to the log-

ging flat cars, plaintiff had failed to sustain the burden of proof. [87]

**SEVENTH:** The court erred in holding that the plaintiff was not legally liable to the railroad company in the sum of \$8000.00.

**EIGHTH:** The court erred in holding the release and discharge of the plaintiff's predecessor in interest, evidenced by "Exhibit 2", that the plaintiffs wholly failed to prove that as the result of the damage to the cars plaintiff was legally liable to the railroad company in the sum of \$8000.00.

**WHEREFORE**, plaintiff and cross appellant prays that said judgment be reversed and that the District Court be directed by the Circuit Court of Appeals for the Ninth Circuit, to enter a judgment in favor of the plaintiff and against the defendant in the sum of \$15,000.00 and interest from the 14th day of January, 1935, until paid, and for plaintiff's costs and disbursements herein.

DATED this 11th day of April, 1935.

HENDERSON and McBEE

Attorneys for Plaintiff

618 First Street, Mount Vernon, Washington.

[Endorsed]: Filed Apr 11 1935 [88]

---

[Title of Court and Cause.]

**ORDER ALLOWING CROSS APPEAL.**

On Motion of Alfred McBee, one of the attorneys for the plaintiff herein, it is HEREBY

ORDERED that cross appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore made and entered herein be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on cross appeal to be posted by the plaintiff be and the same is hereby fixed in the sum of \$500.00, the same to act as a bond for costs and damages on cross appeal, and as a supersedeas bond on cross appeal.

DATED this 11th day of April, 1935.

JOHN C. BOWEN  
District Judge.

[Endorsed]: Filed Apr 11, 1935 [89]

---

[Title of Court and Cause.]

**COST BOND ON CROSS-APPEAL.**

KNOW ALL MEN BY THESE PRESENTS, that We, Guy H. Clark, as receiver of the Montborne Lumber Company, a corporation, as principal, and the UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation, as surety, are held and firmly bound unto the North River Insurance Company, a corporation, in the full and just sum of \$500.00 to be paid to the North River In-

surance Company, a corporation, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

IN TESTIMONY WHEREOF, Guy H. Clark as receiver of the Montborne Lumber Company, a corporation, has executed this instrument and the said United States Fidelity & Guaranty Company, a corporation has likewise caused this instrument to be executed on its behalf and in its name by JOHN C. McCOLLISTER, its attorney in fact, and its corporate seal to be hereon set, all on this 11th day of April, 1935.

The condition of this obligation is such that

WHEREAS, lately at a District Court of the United States for the Western District of Washington, Northern Division, in an action pending therein, between Guy H. Clark, as Receiver of the Montborne Lumber Company, a corporation, as plaintiff, and North River Insurance Company, a corporation, as defendant, a judgment was rendered on the 14th day of January, 1935, wherein the said Guy H. Clark as such receiver was granted judgment against the North River Insurance Company, a corporation, in the sum of \$7000.00, and interest and costs, and

WHEREAS, said judgment also denied recovery to the said Guy H. Clark as receiver aforesaid in the sum of \$8000.00 and

WHEREAS, the said Guy H. Clark, as receiver aforesaid has petitioned for an allowance of a cross

appeal from the said judgment and filed a copy thereof in the office of the clerk [90] of said court to reverse said judgment in said action, and a citation will hereafter be directed to the said North River Insurance Company, a corporation, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, in the State of California, on a day certain to be fixed by the court, and within thirty days from and after the date of said citation.

NOW, THEREFORE, the condition of this obligation is such that if the said Guy H. Clark, as receiver aforesaid, shall prosecute his said cross appeal to effect and answer all damages and costs, if he fails to make his plea good, then the above obligation to be void, otherwise to remain in full force and effect.

**GUY H. CLARK**

Receiver of the Montborne Lumber Company,  
a corporation

[Seal]                   **UNITED STATES FIDELITY  
& GUARANTY COMPANY,**  
                          a corporation  
                          By JOHN C. McCOLLISTER

Approved April 11, 1935.

**JOHN C. BOWEN**

Judge of the District Court of the United  
States for the Western District of Wash-  
ington, Northern Division. [91]

State of Washington  
County of Skagit—ss.

On this 11th day of April, 1935, before me, a Notary Public in and for the State of Washington, County of Skagit, residing at Mount Vernon, Washington, personally appeared GUY H. CLARK, to me known to be the person whose name is subscribed to the within instrument, as the Receiver of the Montborne Lumber Company, a corporation, and acknowledged to me that he subscribed his name as receiver of said corporation for the uses and purposes herein mentioned and described.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, all on the day and year in this certificate first above written.

[Notary Seal]                            ALFRED McBEE

Notary Public in and for the State of Washington, residing at Mount Vernon.

State of Washington  
County of                                 —ss.

On this 11 day of April, 1935, before me, FRANK DRISCOLL, a Notary Public in and for the City of Seattle, County of King, State of Washington, personally appeared John C. McCollister to me known to be the person whose name is subscribed to the within instrument as the attorney in fact of the UNITED STATES FIDELITY & GUARANTY COMPANY, and acknowledged to me that he subscribed the name of the United States Fidelity & Guaranty Company thereto as surety, and his own name as Attorney in fact.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, all on the day and year in this certificate first above written.

[Notary Seal] FRANK DRISCOLL

Notary Public in and for the State of Washington, County of King, residing at Seattle, Washington

[Surety Company Seal]

[Endorsed]: Filed Apr 11, 1935 [92]

---

[Title of Court and Cause.]

ACCEPTANCE OF SERVICE.

Service is hereby accepted and receipt is hereby acknowledged of true and correct copies of the following papers and documents in the above entitled cause:

1. Petition for Cross appeal.
2. Order allowing cross appeal.
3. Praeclipe for transcript of record on cross appeal.
4. Cost bond on cross appeal.
5. Cross appellant's assignment of errors.
6. Citation and notice of cross appeal.

SAWYER & CLUFF

L. B. daPONTE

ROBERT S. MACFARLANE

Attorneys for North River Insurance Company,  
a corporation.

[Endorsed]: Filed Apr 11 1935 [93]

[Title of Court and Cause.]

**PRAECIPE FOR TRANSCRIPT OF RECORD  
ON CROSS APPEAL.**

**TO THE CLERK OF THE ABOVE ENTITLED  
COURT:**

You are requested to take a transcript of the record and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, omitting all captions and endorsements, verifications, etc., but containing all proofs of service, and to include in such transcript of record the following and no other papers, that is to say:

1. Summons.
2. Complaint.
3. Petition for Removal.
4. Notice of Intention to file Petition and Bond for Removal.
5. Bond on Removal.
6. Order of Removal.
7. Answer.
8. Bill of exceptions.
9. Cross appellant's assignment of errors.
10. Cross appellants Petition for cross appeal.
11. Order allowing cross appeal and fixing amount of cross appellants cost bond.
12. Cross appellant's cost bond.
13. Cross appellant's Citation.
14. Cross appellant's Praecipe.
15. Cross appellant's acceptance of service (showing acknowledgment of service by appellant.)

16. Your Certificate.

17. Stipulation and Order extending time.

HENDERSON and McBEE

Attorneys for Plaintiff

618 First Street, Mount Vernon, Washington [94]

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this court.

HENDERSON and McBEE

Attorneys for Plaintiff.

SAWYER & CLUFF

L. B. daPONTE

ROBERT S. MACFARLANE

Attorneys for Defendant.

[Endorsed]: Filed Apr 11, 1935 [95]

---

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT ON CROSS  
APPEAL.

United States of America,  
Western District of Washington—ss:

I, EDGAR M. LAKIN, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record on cross appeal,

consisting of pages numbered from 1 to 88, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, (with the exception of the Summons as requested in said praecipe, none having been included in the transcript on removal from Skagit County to this Court), as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on cross appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the cross appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return	230
folios at 15¢	\$ 34.50
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript on cross appeal	.50
<hr/>	
Total	\$ 40.00

[96]

I hereby certify that the above cost for preparing and certifying record on cross appeal, amounting

to \$40.00 has been paid to me by the attorneys for the cross appellant.

I further certify that I attach hereto and transmit herewith the original citation on cross appeal issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District, this 17 day of April, 1935.

[Seal]                    EDGAR M. LAKIN,  
Clerk United States District Court for the  
Western District of Washington,  
By TRUMAN EGGER  
Deputy. [97]

---

[Title of Court and Cause.]

**CITATION AND NOTICE OF CROSS APPEAL**

To the North River Insurance Company, a corporation, and to Sawyer and Cluff, and to L. B. daPonte and Robert S. MacFarlane, attorneys for said defendants,

**GREETING:**

**YOU ARE HEREBY NOTIFIED** that in a certain action at law in the District Court of the United States for the Western District of Washington, Northern Division, wherein Guy H. Clark, as receiver of the Montborne Lumber Company, a corporation, is plaintiff, and North River Insurance Company, a corporation, is defendant, a cross appeal

has been allowed to the defendant therein to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said court at the City and County of San Francisco, State of California, on the 9th day of May next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Seattle, in the Ninth Circuit, this 11th day of April in the year of our Lord one thousand nine hundred and thirty-five.

[Seal]

JOHN C. BOWEN

Judge of the District Court of the United States, for the Western District of Washington, Northern Division.

[Endorsed]: Filed Apr 11 1935 [98]

---

[Title of Court and Cause.]

### STIPULATION

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective counsel undersigned, that all papers in connection with the appeal and cross appeal of the above entitled cause may be printed under one cover and that it shall not be necessary to print in the cross-appellant's transcript of record any papers, documents or exhibits which are printed in the appellant's transcript of record, and that it shall only be neces-

sary to print in cross appellant's transcript of record the following papers:

1. Cross appellant's petition for cross appeal.
2. Order allowing cross appeal.
3. Cross appellant's citation and notice of appeal.
4. Cross appellant's appeal bond.
5. Cross appellant's assignment of errors.

and such others in connection with the cross appeal as may seem to the Clerk of the Circuit Court of Appeals necessary to perfect cross appellant's appeal.

DATED this 25th day of April, 1935.

HENDERSON & McBEE

Attorneys for Cross Appellant

L. B. da PONTE

ROBERT S. MACFARLANE

SAWYER & CLUFF

Attorneys for Appellant

SO ORDERED:

CURTIS D. WILBUR

Senior U. S. Circuit Judge.

[Endorsed]: Certified Transcript upon cross-appeal. Filed April 19, 1935.

PAUL P. O'BRIEN

Clerk [99]

